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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 161.

JOHN T. SHOENER, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED DECEMBER 2, 1907.

(20,473.)

(20,473.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 508.

JOHN T. SHOENER, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1907.

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1 In the Supreme Court of the United States.

JOHN T. SHOENER, Plaintiff in Error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Petition for Writ of Error.

Now comes John T. Shoener, the above named plaintiff in error, by Chas. A. Douglas, his attorney, and says that on the 8th day of September, 1905, he was convicted of the crime of embezzlement in the Court of Quarter Sessions in and for the County of Schuylkill, in the state of Pennsylvania, and on the 23rd day of October, 1905, he was by said Court sentenced to pay a fine of $7,243.28, and to undergo punishment in the Schuylkill County prison by separate and solitary confinement at labor for two years and six months from the said 23rd day of October, 1905; that he prosecuted an appeal from said judgment to the Superior Court of Pennsylvania, and on the 12th day of March, 1906, the said Superior Court affirmed the judgment of the Court of Quarter Sessions in and for the County of Schuylkill; that from the judgment of said Superior Court he prosecuted an appeal to the Supreme Court of Pennsylvania, and said Supreme Court, on the 27th day of June, 1906, rendered a final judgment in said cause, affirming the judgment of said Court of Quarter Sessions in and for the County of Schuylkill and said Superior Court of Pennsylvania.

The said Supreme Court of Pennsylvania is the highest court of said state of Pennsylvania in which a decision of this cause can be had.

The plaintiff in error says that in the final judgment of the said Supreme Court of Pennsylvania and in the judgments and proceedings prior thereto in this cause, certain errors were committed to the prejudice of said plaintiff in error, all of which will more
2 in detail appear from the assignment of errors which are filed herewith and made a part whereof.

Wherefore your petitioner prays that a writ of error may issue in his behalf from the Supreme Court of the United States to the Supreme Court of Pensylvania for the correction of the errors and the reversal of the judgment as complained of; that a transcript of the record and all proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States; that said writ of error may operate as a supersedeas; that the amount of security, if any, other than as already given for his appearance when wanted, which the petitioner shall give and furnish on said writ of error, may be fixed, and that all further proceedings in said court be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States.

Dated the — day of November, 1906.

WILLIAM WILHELM,
CHAS. A. DOUGLAS,
Attorneys for Petitioner.

Endorsement: In the Supreme Court of the United States—John T. Shoener, Plaintiff in Error, *vs.* The Commonwealth of Pennsylvania, Defendant in Error—Petition for Writ of Error—William Wilhelm, Charles A. Douglas Attorneys at law, Washington, D. C.

3 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Eastern District, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said case of the Commonwealth of Pennsylvania against John T. Shoener, No. 131 January Term, 1906, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said John T. Shoener, as by his complaint appears. We being willing that error, if any hath been, should be duly correctly, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

4

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 3rd day of November, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

5 *Bond.*

Know all men by these presents, That we, John T. Shoener, as principal, and William Wilhelm, as surety, are held and firmly bound unto The Commonwealth of Pennsylvania in the full and just sum of Five hundred dollars, to be paid to the said The Commonwealth of Pennsylvania, etc., certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of November, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a session of the Supreme Court of the State of Pennsylvania in a suit depending in said Court, between The Commonwealth of Pennsylvania and John T. Shoener, a judgment was rendered against the said John T. Shoener, and the said John T. Shoener having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Governor and Attorney General of the State of Pennsylvania and to the District Attorney of Schuylkill County, Penna., citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said John T. Shoener shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN T. SHOENER. [SEAL.]
WM. WILHELM. [SEAL.]

Sealed and delivered in presence of
LUKE NASH.
GEORGE BIRDBECK, JR.

Approved by—
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

6 And now, November sixth, 1906, William Wilhelm, the surety to this bond, after being duly affirmed according to law, deposed and said that he was worth Twenty-Five thousand dollars in real estate in excess of all liabilities.

Affirmed before me this day and year aforesaid.
GEORGE BIRDBECK, JR.,
Deputy Clerk of United States Circuit Court, E. D. of Penna.

The surety is hereby approved.
Nov. 6, 1906.
JOHN B. McPHERSON,
District Judge.

7 Supreme Court of Pennsylvania, Eastern District.

Among the Records and Proceedings of the Supreme Court of Pennsylvania in and for the Eastern District, *inter alia,* the following is thus contained:

Appearance Docket.

Docket Entries.

No. 131, January Term, 1906.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff,
v.
JOHN T. SHOENER, Defendant.

Joseph W. Moyer, James B. Reilly, William Wilhelm:

Appeal of defendant, Q. S., 905; September Sessions, 1905; Superior Court, 211, Oct. Term, 1905, from the judgment affirming the judgment of the Court of Quarter Sessions of the County of Schuylkill.

Superior Court, 211, Oct. Term, 1905.

Appeal from the Superior Court. Filed March 29, 1906.

Eo die, certiorari exit, Retble. the third Monday of April, 1907.

March 29, 1906. Record returned and filed.

May 15, 1906. Assignments of error filed.

March 19, 1906. Petition for an allowance of an appeal from the Superior Court to Supreme Court filed on motion of William Wilhelm, Attorney for Appellant.

March 23, 1906. Appeal allowed. *Per curiam.*

April 19, 1906. Petition to advance filed on motion of C. E. Berger.

April 27, 1906. Case advanced to week beginning May 14,
8 1906. *Per curiam.*

May 15, 1906. Argued.

June 27, 1906. The judgment of the Superior Court, affirming that of the Court of Quarter Sessions, is affirmed. Opinion by Brown, J.

June 29, 1906. Remittitur exit and with record sent to the Clerk of the Court of Quarter Sessions of Schuylkill County.

July 11, 1906. Petition for release from Schuylkill County Prison and order allowing the release filed. *Per curiam,* Mitchell, C. J.

July 11, 1906. Petition for reargument filed. William Wilhelm, for appellant.

October 22, 1906. Reargument refused, and it is ordered that John T. Shoener, appellant and defendant forthwith surrender himself to the keeper of the jail of the County of Schuylkill to serve such portion of his sentence as had not been served on July 11, 1906. *Per curiam.*

9 October 23, 1906. Certificate with two records sent to the Clerk of the Quarter Sessions of Schuylkill County.

October 25, 1906. Petition for allowance of a Writ of Error to the Supreme Court of the United States filed by William Wilhelm, Att'y for Appellant.

October 25, 1906. Writ of Error to the Supreme Court of the United States refused there being in my opinion no federal question involved. Mitchell, Chief Justice.

November 8, 1906. Writ of Error of the Supreme Court of the United States allowed by Justice Edward D. White brought into office.

Eo die. Copy of Petition for Writ of Error brought into office.

Eo die. Bond in $500. approved by Justice Edward D. White brought into office.

November 27, 1906. Certified Transcript of Record exit and sent to Hon. James H. McKenney, Clerk of the Supreme Court of the United States.

10 *Appeal and Affidavit.*

In the Supreme Court of Pennsylvania for the Eastern District.

Superior Court of Pennsylvania, October Term, 1905.

No. 211.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff,

—.

JOHN T. SHOENER, Defendant.

Court of Quarter Sessions of Schuylkill County.

No. 905, September Term, 1905.

Enter Appeal on behalf of Defendant —— —— from Judgment of the Superior Court affirming the Judgment of the Court of Quarter Sessions of the County of Schuylkill.

JOS. W. MOYER,
WM. WILHELM,
JAMES B. REILLY,
Attorneys for Appellant.

To Alex. K. McClure, Prothonotary Supreme Court—Eastern District.

COUNTY OF SCHUYLKILL, *ss:*

John T. Shoener, being duly sworn saith that said Appeal is not taken for the purpose of delay, but because appellant believes he has suffered injustice by the judgment from which he appeals.

JOHN T. SHOENER.

Sworn and subscribed this 28 day of March A. D. 1906.
[SEAL.] PETER A. McCABE,
Justice of the Peace.

My commission expires May 1, 1910.

Endorsement: No. 131 January Term 1906—Supreme Court of Pennsylvania, Eastern District,—Commonwealth of Pennsylvania *v.* John T. Shoener, Appellant. Appeal and Affidavit. Fied Mar. 29, 1906 In Supreme Court. Joseph W. Moyer, James B. Reilly, Wm. Wilhelm, Attorneys for Appellant.

11 *Præcipe for Certiorari.*

In the Supreme Court of Pennsylvania for the Eastern District.

Certiorari to the Superior Court of Pennsylvania, October Term, 1905.

No. 211.

JOHN T. SHOENER, Appellant.

Issue Certiorari to the Superior Court of Pennsylvania to bring up record and proceedings in a certain action in said court, No. 211 October Term 1905, and 905 September Term 1905, wherein Commonwealth of Pennsylvania was plaintiff, and the said appellant was defendant.

Returnable to next term, *sec. reg.*

JOSEPH W. MOYER,
WM. WILHELM,
JAMES B. REILLY,
Attorney- for Appellant.

To Alex. K. McClure, Prothonotary, Supreme Court—Eastern District.

Endorsement: No. 131, January Term, 1906—Supreme Court of Pennsylvania, Eastern District,—Commonwealth of Pennsylvania *v.* John T. Shoener, Appellant. Præcipe for Certiorari. Filed Mar. 29, 1906. In Supreme Court. Joseph W. Moyer, Jas. B. Reilly, Wm. Wilhelm, Attorneys for Appellant.

12 *Petition for an Allowance of an Appeal from the Superior Court of Pennsylvania to the Supreme Court.*

In the Supreme Court of Pennsylvania.

No. 211, October Term, 1905, Philadelphia District.

COMMONWEALTH
vs.
JOHN T. SHOENER, Appellant.

An appeal from the Court of Quarter Sessions of Schuylkill County, No. 905, September Term, 1905.

To the Honorable James T. Mitchell, Chief Justice, and Justices of the Supreme Court of Pennsylvania:

The petition of John T. Shoener, the above named defendant, respectfully represents: That the Superior Court of Pennsylvania, in the above case, in an opinion by Mr. Justice Porter, filed March 12, 1906, dismissed all the assignments of error, and affirmed the judgment, and ordered that the defendant appear in the Court of Quarter Sessions of Schuylkill County and by that Court be committed until such part of the sentence as had not been performed when the appeal was made be complied with,—which order and affirmation of the judgment is adverse to your petitioner on the material questions, especially upon the Constitutional questions raised in the trial of the case, which were the basis of the several assignments of error. A copy of the opinion of the Superior Court Justice, and the paper books submitted to the said court, are submitted with this petition.

One of the principal questions involved was the right of your petitioner, under the eleventh paragraph of article first of the Constitution of Pennsylvania, which provides that "No person shall for the same offence be twice put in jeopardy of life of limb;" and which was expressed on page seventy-three of Appellant's Superior Court paper book, in the following language:

13 "Whether a defendant, who has been tried under a valid indictment, acquitted by a judgment of the Supreme Court on the same, and enters a plea of *autrefois acquit*, can be tried again for the same offense set out in the former valid indictment."

Your petitioner was elected Clerk of the Court of Quarter Sessions of Schuylkill County at the general election held in November, 1899, and entered upon the duties of his office the first Monday of January, 1900. He served out his term, which expired January 5, 1903. Your petitioner set up a claim for the license moneys, under section third, pages 469, 470, Pamphlet Laws of 1897. He made his monthly returns, as is provided by the Controller's Act relating to counties of over one hundred and fifty thousand population, and in these returns he set forth the fact that he had these moneys and

held them subject to judicial determination. November 20, 1901, the County of Schuylkill proceeded by summons to test the right of your petitioner to retain these license moneys. November 21, 1901, a case stated was filed. December 22, 1902, judgment on the case stated was entered against the defendant for $5380.00. The question as to who had the right to these license moneys was finally determined, in the civil proceeding, by your honorable body, and on May 11, 1903, a remittitur was filed in the Court of Common Pleas, affirming the judgment of the lower Court.

January 3, 1903, the Controller of Schuylkill County instituted criminal proceedings and charged the defendant with embezzlement. November 14, 1903, a valid bill of indictment containing thirteen counts was found, each of which charged embezzlement in one form or another, under the Act of March 31, 1860, relating to embezzlement by public officers. January 4, 1904, the case was called for trial, and on January 8, 1904, the jury returned a verdict of guilty on the fourth, eighth and twelfth counts. The motion in arrest of judgment and for a new trial was overruled February 29, 1904, and the defendant was sentenced on March 7, 1904, on the eighth and twelfth counts of the indictment. The case was appealed to
14 the Superior Court, and the Superior Court sustained the Court of Quarter Sessions, except to reverse it as to the form of sentence. On September 19, 1904, your honorable body allowed an appeal, which was entered to No. 286, January Term, 1904; and on June 22, 1905, judgment was rendered reversing the Superior Court and Court below, and directing that defendant be discharged from his recognizance. June 30, 1905, F. J. Noonan, County Treasurer, made a demand upon the defendant, to pay to the county of Schuylkill the sum of $7243.28. August 30, 1905, A. J. Shortall, a representative of what is known as The Taxpayers' Association, swore out a warrant for the arrest of your petitioner, for embezzlement, for the identical funds for which he was tried in January, 1904, and as to which your honorable body, by its judgment just recited, directed that your petitioner be discharged from his recognizance,—the indictment in the present case being for the same funds, and practically in the same language as that for which he was formerly acquitted and discharged.

The language of the fourth, eighth and twelfth counts of the indictment in the former trial, covering the three years for which he was tried in this case is: "Did fail to pay over the same when thereunto required by the county of Schuylkill or its legally authorized officers, to the Treasurer of the county of Schuylkill, he being the proper officer authorized to demand and receive the same." The language in the present indictment, which embraces the same three years in one count is: "Did unlawfully fail to pay over the same unto the aforesaid Treasurer when thereunto legally required, as aforesaid, by F. J. Noonan, Treasurer of the County of Schuylkill, he, the said F. J. Noonan, being the proper officer authorized to demand and receive the same."

The Superior Court concludes its opinion on the constitutional

questions raised by the plea of *autrefois acquit,* in the following language:

15 "There never was a time when a lawful demand could have been made upon the defendant to pay these fees, until after the question of their ownership was determined by the Supreme Court on May 4th, 1903. This was distinctly held with regard to the twelfth count of the indictment in the former proceedings, which distinctly charged the receipt of the fees to have been in January 1903, and which was supported by evidence that the money was actually received by the defendant in December 1902, and that he acknowledged said receipt in his official return on the first Monday of January 1903.

"The defendant had received the money in question by virtue of his office, when the question of its ownership was determined by the decision of the Supreme Court on May 4th, 1903 it became his duty to pay the money to the county treasurer, but his failure to pay it did not, under the provisions of the 65th section of the act of March 31st, 1860, become criminal until after the county treasurer had made demand. When the tresaurer did make such demand, the offense was complete. The instruction of the court below to the jury to render a verdict in favor of the Commonwealth upon the issue raised by the plea of *autrefois acquit,* was, under the records and the evidence presented, correct."

Your petitioner is informed and believes that the question at issue was not as is set out in the opinion of the Superior Court just quoted, but that what was contended for before your honorable body in the former criminal trial was that the indictment alleged that a demand had been made by the County Treasurer, the proper officer to make the demand, and that the proofs were that the County Treasurers did not make any such demand—not that the County Treasurers could not have made a demand, but that they did not, and that the County Treasurers swore they did not; and there was no question determined by your honorable body that the County Treasurer could not make a demand, before it was finally decided that the fees belonged to the County, but that no demand was made,

16 as was alleged in the indictment, at any time, by the proper officer, either before or after the final adjudication as to where the fees were to be paid.

The first, second, third, and fourth assignments of error raise the question "Whether where there is a charge of embezzlement on the part of a public officer and the act makes it requisite on the part of another public official to make a demand, the statute of limitations starts to run from the time of the conversation or from the time the demand was made." Your petitioner's contention before the Court below and in his appeal before the Superior Court was that he received no moneys later than January 5th, 1903; that the remittitur was filed May .11th, 1903, deciding that the county of Schuylkill was entitled to these fees; that the statute of limitations started to run at least not later than the time of the filing of the remittitur, May 11th, 1903. The Commonwealth contended that a subsequent act of the County Treasurer, even though it was done

more than two years after the remittitur was filed, determined the time when the statute of limitations would start to run, and that therefore the demand made on June 30, 1905, more than two years after even the remittitur was filed, determined the time of the running of the statute of limitations. The Court below and the Superior Court decide that that contention is correct. Your petitioner believes that the decision of the lower and Superior Courts, that the County Treasurer, by his act, may toll the running of the statute of limitations, is grievous error, and that great injustice is thereby done your petitioner; and that the question of sustaining a proposition that it is within the province of a County official to determine when the statute of limitations shall or shall not begin to run, is at variance with all well settled principles of law on the question of the statute of limitations, and is a dangerous innovation upon the protection that has heretofore surrounded a citizen when he has invoked the plea of statute of limitations.

17 Therefore your petitioner avers that the Superior Court erred in not sustaining the various assignments of error specified in the appeal to said Court, and prays your honorable Court to be permitted to have his case heard and reviewed by this honorable Court upon the questions thereby raised. and that the said order of supersedeas made by the Superior Court be continued until a final determination of this appeal. . And he will ever pray.

JNO. T. SHOENER.

STATE OF PENNSYLVANIA, *County of Schuylkill, ss:*

John T. Shoener, being duly sworn according to law doth depose and say that the facts set forth in the foregoing petition are correct and true to the best of his knowledge and belief.

JNO. T. SHOENER.

Sworn and subscribed before me this 17th day of March 1906.

[SEAL.] PETER A. McCABE,
Justice of the Peace.

My commission expires May 1, 1910.

18 Endorsement: 131 January Term 1906—Commonwealth *v.* John T. Shoener, Appellant—Petition for an allowance of an appeal from the Superior Court—Filed Mar. 19, 1906, in Supreme Court—Mar. 27, 1906, *Appeal allowed: Per Curiam.*—Wm. Wilhelm.

19 In the Supreme Court of Pennsylvania.

No. 131, January Term, 1906.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOHN T. SHOENER.

Assignments of Error to the Superior Court.

First. The Superior Court erred in its opinion in passing upon the first assignment of error, which assignment of error is as follows:—

"First. The Court erred in overruling the third paragraph of Defendant's demurrer, which paragraph and ruling are respectively as follows (See Appendix, page- 8 and 12 to 15):

'Third. That the offence charged in said indictment is barred by the statute of limitations, the same having been found more than two years after the moneys alleged to have been received by the Defendant and which he failed to pay over, came into his hands.'

Answer. 'As to the third cause of demurrer, which raises the question of the statute of limitations, alleging "that the offence charged in said indictment is barred by the statute of limitations, the same having been found more than two years after the moneys alleged to have been received by the Defendant, and which he failed to pay over; came into his hands," if we believed, under the particular circumstances of this case, that the statute of limitations began to run from the time that he received this money, as this clause says, we would be disposed to sustain this proposition, but we cannot accept that view of it under the decision of the Supreme Court in this particular case. If that were correct, of course two years from the time the money reached his hands, a good part of which had reached his hands back in 1900, according to the indictment, or some of it, at least, in 1900 and 1901—as to that money, the right to pros-

20 ecute would have been barred long ago, and before the Supreme Court ever decided the previous trial, which we think is not the case, and which we think is plainly indicated by the language of the Supreme Court. Now in this opinion it is held that the demand made in December, 1902, was not authorized; that it could not be made because the civil proceeding had not then been decided. It had been decided in this Court, but it was pending in the higher Court. Subsequently they affirmed the action of this Court, but Justice Brown, in delivering the opinion of the Supreme Court, says, that it was competent for these parties to make the agreement known as the case stated, during the pendency of which the Defendant could not be called upon to pay over the money, until there was a determination deciding which of the parties claiming it had a right to it, whether the County of Schuylkill or the Defendant. He thereby recognized the right of the parties to suspend the making of a demand, and enforces that right in favor of the De-

fendant, to the extent of preventing the county from making, or holding that the County could not make such a demand, during the existence of that civil proceeding; and then, in discussing that, he points out, as we understand the ruling of the Court, what character of demand will be considered sufficient in a criminal case, such as this, under the circumstances of this particular case, and we will read a portion of this, as indicating the kind of demand that would be required: "The learned trial Judge charged the jury that the institution of the suit in the common pleas of the County was a legal demand for the payment of the money and should be regarded as such demand in the prosecution of the appellant on the counts charging him with failing to pay over on demand. In the civil courts constructive demands may be and are recognized, but not so in a criminal court, in the prosecution for an offence having as one of the statutory ingredients, a refusal to pay on demand.'

Now the Act says, "or fail to pay over the same when there-
21 unto legally required by the State, County or Township Treasurer or other proper officer or person authorized to demand and receive the same." Justice Brown says, "A demand there means actual demand. The only actual demand that the Commonwealth pretends to have made was the Controller's letter. It was written after the institution of the civil suit and after the distinct agreement by the County that the question of Defendant's liability should be judicially determined. Before being so determined, there was no liability to be enforced against him civilly, and therefore no demand could be made upon him that he was bound to recognize," and then goes on to state that he had been acquitted of the other offences.

Under this language, we are led to the conclusion that until a demand was made after this decision, until a demand was made, no crime for failing to pay over the money existed. We think that is a fair interpretation of the language of the Supreme Court. If, therefore, no crime existed for not paying this money over until after a demand was made, it follows, in my judgment, that until that demand was made, there was no right to prosecution, and I do not know of any authority that holds that the right to prosecute can be barred before the right to prosecute exists; consequently I am led to the conclusion that the right to prosecute existed after the demand was made, and the alleged crime was committed when there was a refusal to pay over that money, or a failure to pay it over after such demand, and that the statute of limitations, under this language, would seem to begin to run from that time, upon the proposition that it could not begin to run until the right to prosecute existed. Whether we are giving an interpretation of this case such as the higher Court will place upon it, if the future of the case makes it necessary, we will only learn when they determine, but we are unable at this time, from anything that is now before us, to say that the right to maintain this prosecution is barred by limitation, under this language.

Mr. REILLY: Will your Honor permit me to add, as an
22 amendment to my third ground of demurrer, so that I may have the benefit of it on the record—it will not affect your

Honor's decision—by including the words. "That the indictment was not found within two years from the time it was judicially determined, May 11, 1903, that the Defendant was liable for the license fees received by him."

The COURT: You can file that among your reasons.

Mr. REILLY: Your Honor will note us an exception and seal us a bill?

The COURT: Certainly.

Defendant excepts. Bill sealed.' "

The following is the Opinion of the Superior Court upon said assignment:

"This indictment charged the Defendant with only one of the acts by the statute made a misdemeanor; the failure to pay over the money when thereunto legally required by the County Treasurer, the proper officer authorized to demand and receive the same. This statute did not make it a misdemeanor for a county officer to fail to pay over public money as soon as he received it, nor as soon as it became his official duty to pay it over under its provisions, it is only after the officer who has collected the money has been legally required to pay by the County Treasurer or other proper officer or person authorized to demand and receive the same, that a failure to make the payment becomes a misdemeanor. That a demand must be made before this offense can be committed; that the demand must be an actual one, and that no constructive demand will meet the requirements of this statute has been definitely settled by the decision of the Supreme Court in Commonwealth *v.* Shoener 212 Pa. 527. This indictment averred that the demand by the treasurer was made on June 30th, 1905. If the other averments of the indictment were true the Defendant was still civilly liable to the County for the money, and the treasurer had the lawful right to make the demand,
had the Defendant then paid the money he would never, so
23 far as the averments of this indictment are concerned, been
guilty of the offense with which he is now charged. It was his failure to pay when the demand was made upon him that brought him within the operation of this statute, the right of the Commonwealth to prosecute then arose, and from the date of the demand the statute of limitation began to run. The first specification of error is dismissed."

Second. The Superior Court erred in its opinion in passing upon the second, third and fourth assignments of error, which assignments of error are as follows:

"Second. The Court erred in its answer to Defendant's first, second, third and fourth points, which points and answer are respectively as follows. (See pp. 33, 34, 35 and 36, Charge of the Court):

'1. That the law of this Commonwealth, relating to public officers, required that the Defendant, whilst Clerk of the Court of said County, on the first Monday of each and every month during his term of office, and the first Monday of the month next after the expiration of his term, pay to the County Treasurer all fees received by him for applications for liquor licenses, and for the transfer of licenses for the preceding month, and to take duplicate receipts there-

fore, and deposit such receipts with the County Controller, together with a transcript in detail of his fee and account book for the preceding month, under oath, and it was his legal duty to do so; if the jury find from the evidence that said Defendant failed to pay over to the County Treasurer said sum of $7243.28 mentioned in the indictment, or any portion thereof, as and when so required by law, to-wit, the first Monday of January, 1903, the offense of failure to pay over under this indictment was then and there complete, and it immediately became the duty of the County Treasurer to demand payment of the same, and his failure so to do could not stop the running of the statute of limitation in favor of the Defendant,
24 and their verdict should be "Not guilty."

'2. That the statute of limitations relating to such cases as this provides that all indictments for any such alleged crime, or misdemeanor shall be brought or exhibited within two years next after such crime or misdemeanor shall have been committed, and not afterwards; and if the jury find from the evidence that the defendant, at any time after the expiration of his term of office, the first Monday of January, 1903, had in his hands and failed to pay over $7243.28, license application and transfer money belonging to the County, or any part thereof, then demand by the County Treasurer could have been at once made, and the Commonwealth were bound to bring their indictment within two years from the time the County Treasurer could have so legally demanded payment of said money, and having failed to do so, as appears on the face of the indictment, the statute of limitations would be a bar, and their verdict should be in favor of the Defendant, "Not guilty."

'3. That the statute of limitations in this case began to run in favor of the Defendant from the time the alleged crime was committed, which was, if at all, when the Defendant failed to pay over to the County Treasurer the license money in his hands as required by Section 2 of the Act of 31 March, 1876, P. L. 13, and not when or after the payment of the same was demanded by the County Treasurer, June 30, 1905, and as the indictment shows on its face that it was found over two years from the time when the payment of said money could have been demanded and indictment found, the verdict of the jury must be "Not guilty."

'4. That any agreement or stipulation entered into between the County of Schuylkill and the Defendant for the purpose of legally determining the legal ownership of said money or any part thereof in a civil proceeding in the courts of the state did not arrest the running of the statute in favor of the Defendant, but the statute became a bar to this indictment in two years after the first
25 Monday of January, 1903, when Defendant's term of office expired and he failed to pay over, and the verdict must be "Not guilty."

Answer. We will answer these four together. All these points bear upon the question of limitation, as to when it begins to run. We have indicated an opinion heretofore during the process of this trial. Briefly stated, in misdemeanors limitation begins to run from the time the crime was committed, or, in other words, from the time

when a right of criminal action exists and a prosecution may be legally instituted. In this case, the 65th section of the Act of 1860 requires the Defendant "to pay over the same when thereunto legally required," and the Supreme Court say such demand must be an actual demand. Until, therefore, he was required to pay over, until such actual demand was made, there was no crime committed. The evidence shows, he was so required to pay, on the 30th of June, 1905, and by actual demand in writing, and hence we hold that to be the period from which the statute began to run, for the statute cannot begin to run in bar of a prosecution before the right of prosecution exists, and consequently we refuse these points.'

"Third. The Court erred in its answer to Defendant's ninth point, which point and answer are respectively as follows (See p. 38, Charge of the Court):

'9. It having been held by the Supreme Court at the former trial that the suit in the civil proceeding was no demand as was contemplated by Section 65 of the Act of 1860, and that no demand was made as was alleged in the indictment, but it having been determined on May 11, 1903, in the civil proceeding, that the moneys belonged to the County and not to the Defendant, the conversion, if any there was, took place immediately following the decision of the Supreme Court, May 11, 1903. And if the Commonwealth neglected for a period of two years, one month and nineteen days after the
26 civil liability of Defendant was determined, to make a demand, and for over two years and three months after the civil liability was determined, to find the indictment in this case, then the Defendant cannot be convicted, as the statutory period of two years ran before either there was a demand or the indictment was found.

Answer. We think this is answered in what we said to you in answer to points numbers one, two, three, and four, and we refer you to that which we then said, as an answer to this point.'

"Fourth. The Court erred in its answer to Defendant's eighth point, which point and answer are respectively as follows (See p. 37, Charge of the Court):

'8. The gist of the offence in this charge is that of conversion, and as the Defendant in this case, John T. Shoener, went out of office on the first Monday of January, 1903, and was contending at the time he was in office and the time he went out of office, that the moneys alleged to have been embezzled in this case were his under the Act of 1897, and that the question was not determined until May 11, 1903, more than two years and three months prior to the finding of this indictment, it being conceded that the statute of limitations is two years, under Section 65 of the Criminal Code of 1860, under which he is indicted, the Defendant cannot be convicted.

Answer. We say this. This point asks us to direct you to acquit the Defendant. We cannot give you such instruction from anything before us in this case, and we therefore refuse this point.'

The following is the Opinion of the Superior Court upon said assignments:

"We must for the reason so clearly stated by Mr. Justice Brown in Commonwealth *v.* Shoener, 212 Pa. 531, hold that in order to com-

plete and render liable to indictment the crime with which this defendant stands charged, there must be an actual demand made upon him by a proper officer, and "a failure to pay that which, at the time the demand is made, clearly belongs to the county making the
27 demand." The offense had no existence until after a lawful demand within the meaning of the statute, was made, and from the date of that demand the statute of limitations began to run. Had the defendant produced evidence that some officer having authority to do so had, at a time when the defendant was legally liable to such demand made upon him, actually demanded that the defendant pay the money to the county treasurer, that evidence would have raised a question of fact as to the time when the first regular and lawful demand was made and the statute of limitations would begin to run from that date. No such evidence was offered. The question attempted to be raised by the Fourth point was not involved in this case; the agreement referred to did not arrest the running of the statute of limitations after it had once commenced to run, but that agreement having been made before the defendant had received the money involved in this proceeding, he had the right from the moment he received it to hold it until the question of the ownership of the fees was determined by the final judgment of the Supreme Court, and it was not until after that final judicial determination that the county treasurer had any right to demand payment of the money. This was expressly ruled in Commonwealth *v.* Shoener, 212 Pa., 527."

Third. The Superior Court erred in its opinion in passing upon the fifth and sixth assignments of error, which are as follows:

"Fifth. The Court erred in its answer to Defendant's plea of *autrefois acquit*, which plea and answer are respectively as follows (See pp. 15 to 38, Appendix):

'In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

Indictment No. 905. Sept. Sessions, 1905.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOHN T. SHOENER.

28 Charge—Embezzlement, under Section 65 of the Act of 1860, with failure to pay over to the County of Schuylkill the sum of $7,243.28. True bill, Monday, September 4th, 1905.

And now, September 6th, A. D. 1905, the Defendant being brought before the Court on the charge above stated preferred by the Commonwealth, and having heard the said indictment, Number 905 September Term, 1905, read and the matters therein contained, says that he ought not to be put to answer the said indictment, he having been heretofore in due manner of law acquitted of the premises specified and charged upon him therein, and for a

plea to the said indictment he says that heretofore, to wit, on the fourth day of January, A. D. 1904, at a session of the Court duly convened, he was duly arraigned upon a certain valid indictment founded upon and under said Section 65, Act of March 31, A. D. 1860, upon which the present indictment was founded, which charged him, the said John T. Shoener, in manner and form as follows:

"In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

No. 175, March Term, 1906.

November T., 1903.

COMMONWEALTH
vs.
JOHN T. SHOENER.

SCHUYLKILL COUNTY, *ss:*

The Grand Inquest of the Commonwealth of Pennsylvania, inquiring for the body of the County of Schuylkill, upon their respective oaths and affirmations, do present and say that John T. Shoener, late of the said County, yeoman, heretofore, to wit, at the general election, held by the qualified electors of Schuylkill County on the seventh day of November, A. D. 1899, was duly elected Clerk of the Court of Quarter Sessions of the County of Schuylkill, to serve as such for the then next ensuing term, commencing on the first Monday of January 1900, and continuing thereafter for a period of three years.

29 That the said John T. Shoener did accept the said election, and did file his bond and take the oath of office required by law and did on the first Monday of January, 1900, enter upon the duties of the said office as Clerk of the Court of Quarter Sessions of the Peace for the County of Schuylkill, a county then and now containing upwards of one hundred and fifty thousand in population, and continued in said office and exercised the duties, powers, rights and privileges of said office in and for the County of Schuylkill until January fifth, 1903.

That the said John T. Shoener, as Clerk of the Court of Quarter Sessions, aforesaid, was by law authorized and required to collect and receive from each applicant for a liquor license in said County, and from each applicant for a transfer of a liquor license previously granted the sum of Five Dollars, and was legally required on the first Monday of each and every month to pay to the Treasurer of the County of Schuylkill all fees so received from the preceding month, taking duplicate receipts therefor, which receipts he was required to deposit with the County Controller, together with a transcript in detail of his fee and account book for the preceding

month under oath, showing a true and correct list of all such fees received as aforesaid.'

(As only the fourth, eighth and twelfth counts of the former indictment under the plea of *autrefois acquit* are involved, we have omitted the 1, 2, 3, 5, 6, 7, 9, 10, 11 and 13th counts of the former indictment. They can be found in full in the Superior Court paper book, 211 October Term, 1905, on pages 49 to 63.)

4. And the Grand Inquest, aforesaid upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the seventh day of January A. D. 1901, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this Court with force and arms, &c., being then and there the duly elected and lawful commis-
30 sioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, did by virtue of his said Office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the Said County of Schuylkill, receive, collect and take into his possession certain public moneys for fees on liquor license applications to a large amount, to wit, Five Thousand Three Hundred and Eighty Dollars, of the value of Five Thousand Three Hundred and Eighty Dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fail to pay over the same, when thereunto required, by the County of Schuylkill or its legally authorized officers, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

8. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the sixth day of January, A. D. 1902, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this Court with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid,
31 then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain public moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to

a large amount, to wit, Six Thousand Five Hundred and Sixty-Five Dollars, of the value of Six Thousand Five Hundred and Sixty-five Dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fail to pay over the same when thereunto legally required by the County of Schuylkill, or its legally authorized officers, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

12. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the fifth day of January, A. D. 1903, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this Court with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain public moneys for fees on liquor license applications and fees on applications for
32 the transfer of liquor licenses previously granted to a large amount, to wit, Six Thousand Three Hundred Dollars, of the value of Six Thousand Three Hundred Dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping, and transfer, as aforesaid, did fail to pay over the same, when thereunto legally required by the County of Schuylkill or its legally authorized officer, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania."

To which last mentioned indictment he did then and there plead Not Guilty, and on the same day a jury was empanelled and sworn to try the said issue between the Commonwealth and the said John T. Shoener, and the trial thereof was proceeded with in due course. On January 6, A. D. 1904, the said jury upon their oaths found as fellows: "Verdict, guilty as to counts, four, eight and twelve, and not guilty as to any of the other counts of the within indictment." Said trial and the proceedings had thereon were reviewed by the Supreme Court of Pennsylvania on appeal to Number 286, January Term, 1904, whereupon it was considered, adjudged and decreed by

the said Supreme Court that the said John T. Shoener should go thereof acquitted, as appears by the records of said proceedings now remaining here in court.

And the said John T. Shoener avers that the said John T. Shoener mentioned in said former indictment, and he, the said John T. Shoener charged in this present indictment, are one and the same person, and not divers and different persons.

And the said John T. Shoener further avers that said sum of $7,243.28 mentioned in the above stated indictment as having been received by the said Defendant, but which he is alleged to
33 have refused to pay over when demanded by said F. J. Noonan, County Treasurer, &c., was and is a part of, covered by and included in the said several sums of money mentioned in the said indictment, proceedings and judgment thereon to Number 175, March Term, 1903, and no other moneys whatever than those; that the misdemeanor and offence charged and laid in the former indictment, and the misdemeanor and offence in the present indictment mentioned are one and the same misdemeanor and offence, and not divers and different misdemeanors and offenses, and this he is ready to verify.

Wherefore, Defendant prays judgment of the Court here, if he ought to be put further to answer the present indictment, and whether the Commonwealth ought to further prosecute or impeach him, the said John T. Shoener, on account of the premises in the present indictment contained, and that he may be dismissed, &c.

(Signed) JNO. T. SHOENER.

Mr. BERGER: We desire to demur to this plea.

The COURT: Demur to what this record contains, to the sufficiency of the record?

Mr. BERGER: Yes, sir.

The COURT: To sustain their plea?

Mr. BERGER: Yes, sir; I will read the demurrer to this special plea.

In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

905. September Sessions, 1905.

COMMONWEALTH
vs.
JOHN T. SHOENER.

Now, September 6, 1905, Charles E. Berger, District Attorney, who prosecutes for the Commonwealth, in answer to the matters and things alleged and pleaded by the Defendant in his special plea filed, being the proceedings and discharge shown by the record of the Supreme Court to No. 286, January Term, 1904, says the
34 same is not sufficient in law to bar the prosecution of the Defendant on the indictment in this case, and this the Common-

wealth is ready to verify by the said record at 286 January Term, 1904, and prays that the same may be inquired of by the Court. Whereupon for want of a sufficient plea on this behalf, he the said Charles E. Berger, District Attorney for the said Commonwealth, prays judgment.

(Signed) CHARLES E. BERGER,
District Attorney.

We ask leave to file this demurrer to the plea.

The COURT: Yes, sir. In order that the Court may know what you charge or assert in this plea, must you not get the record before the Court?

Mr. REILLY: We must prove that, yes.

The COURT: The Court can only decide upon the record, and that must come before the Court.

Mr. REILLY: The effect of the filing of the demurrer in law, is to admit all the averments in our plea.

The COURT: The demurrer filed here admits the existence of this record and says, even if such record does exist, that is not sufficient.

Mr. REILLY: It admits all the averments in our plea, that we were tried once before and acquitted upon the same charge.

The COURT: Oh, no. If it admits that, what is the use in having any record? What is the use of arguing anything?

Mr. REILLY: The plea of *autrefois acquit* is the same as any other plea.

The COURT: The offence charged in the indictment now before us is drawn under this language in the 65th section of the Act of 1860: "Or fail to pay over the same when thereunto legally required by the state, county or township treasurer or other proper officer or person authorized to demand and receive the same." We have before us a plea of former acquittal on the part of the Defendant as against this charge, by reason of the trial on the previous indictment, and we want to say now that this record, as now presented to us, shows a trial of this same Defendant on an indictment charging him in thirteen different counts. Of the thirteen counts contained in that indictment, he was acquitted of the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh and thirteenth. Nine of these counts, being the ones first named or all those excepting the thirteenth, charge him with embezzlement and the conversion of money to his own use, received for license fees. The thirteenth charges him with a like offence, excepting that it was for moneys received for transfers. The fourth, eighth and twelfth charge him simply with having failed to pay over the license fees "when thereunto legally required by the County of Schuylkill or its legally authorized officers, to the Treasurer of the County of Schuylkill.

35

Now, in the first place it is contended on the part of the Defendant, as we understand his counsel, that the ten counts, or some of the ten counts of which he was acquitted, contain the charge of failing to pay over the moneys that he received in his office as an official, license moneys, for licenses and for transfers. We cannot accept

this construction of the first indictment nor of the contents of these particular counts. It would lead to a somewhat awkward position to say that the Defendant had first or during the trial been acquitted in these counts of not paying the money over, and then convicted on the fourth, eighth and twelfth, of not paying it over, or, in other words, both convicted and acquitted in the same trial and on the same indictment. We think if any such construction as this could be placed on the counts as contended for by Defendant, the Supreme Court, when this case was before them in the former case, instead of simply saying that there was no demand, would have said that the result of a verdict of not guilty on the other nine or ten counts, or whatever number of them are claimed to charge this same offence, would be such that he could not be convicted on the fourth,
36 eighth and twelfth, but that he must be regarded as acquitted of all. This would be exactly in line with the contention in Commonwealth *vs.* Weiderhold, 112 Pa., where, in our own county, in the first count they charged the party with arson, and in the second count intended to charge him with firing a building not a part and parcel of a dwelling house, but omitted the word "not," leaving it standing exactly the same as the charge contained in the first count, and it was held by the Supreme Court that he was acquitted, and I think such would be the effect if the counts named in this indictment that I have named, as being the ones of which he was acquitted, charged the same offence, or if any one of them did charge the same offence that was found in the fourth, eighth and twelfth. But we cannot regard the counts as charging the same offence. We believe that the fourth, eighth and twelfth, just as the Supreme Court says in its opinion, charge nothing, excepting a failure to pay over.

Now it is claimed—it being admitted, of course, that this Defendant is the same party who was defendant in the former indictment—that the trial of the former charge was a trial of the same charge that is now contained in the present indictment against him. We will refer to but two authorities, because in those authorities there are numerous other authorities referred to, and we will not take the time to refer to all of them. First we refer to the case of Commonwealth *vs.* Tadrick, 1 Sup. 564, beginning with this portion: "Returning to the plea of *autrefois acquit,* it was held in Heikes *vs.* Commonwealth, 26 Pa. 513 (citing People *vs.* Bauste, 1 John. 66), that 'the true test to ascertain whether the plea of *autrefois acquit* be a good bar is, whether the evidence necessary to support the second indictment would have been sufficient to secure a legal conviction on the first.'" This is made one of the tests, and we think we need not say that the evidence necessary to sustain a conviction on this indictment would not sustain a conviction on
37 the previous indictment, because it would leave as absent one of the elements of the crime. It would leave the previous indictment standing without any demand, and without the demand there would be no crime, and demand made after that prosecution was instituted and the indictment found could not be presented upon the trial of that case. Therefore, the evidence would not sustain a

conviction on the first count of the indictment; that is, the evidence that would be necessary for a conviction, under this language, "The true test to ascertain whether the plea of *autrefois acquit* be a good bar is, whether the evidence necessary to support the second indictment would have been sufficient to secure a legal conviction on the first,"—we say the evidence necesary to support the second indictment would not procure a legal conviction on the first, because the evidence would not be admissible and the crime would have no legal existence, there being no demand.

Now we will take the case in 84 Pa. (Com. *vs.* Trimmer, 84 Pa. 65), because these cases seem to be a statement of the principle in the reverse order, one the opposite of the other. "Whether the former acquittal was for the same offence depends on the record pleaded, and not on the argument or inference deduced therefrom. The defendants plead in bar a former trial on no other indictment than the one set forth in the plea. If that record shows that the evidence necessary to support a conviction on the present indictment, would have been insufficient to procure a legal conviction on the former, the plea of *autrefois acquit* is not sustained." That is the reverse statement. For the reason that we have just given, it must necessarily follow that such would be the case, and that it could not be held as a plea under this rule; and this case also shows that it is the duty of the Court, under such circumstances as these, to declare the effect of that which has been presented.

In addition to the cases cited, for instance, the cases of
38 Com. *vs.* Trimmer, which I have just cited; Hilands *vs.* Com., 114 Pa.; Com. *vs.* Montross, 8 Sup.; Com. *vs.* Zepp, 3 Clark (which is not a Supreme Court decision, however); Com. *vs.* Hilands, 111 Pa., and also Altenburg *vs.* Com., 126 Pa., we want to put upon record that under the ruling of the Supreme Court in this very case the Supreme Court show that it is an absolute necessity that there should be an actual demand, without which there would be no crime. The failure to pay on demand, as contemplated by the statute under which he is indicted, is a failure to pay that which, at the time the demand was made, belonged to the County making the demand. Then further on he says: "A demand there means an actual demand," and points out that a constructive demand, such as would arise from a judgment, which would be a demand in a civil court, would not be a sufficient demand in this case; and why? Because the Act of Assembly, as we understand this ruling, renders that absolutely necessary—"or fail to pay over the same when thereunto legally required by the state, county or township treasurer or other proper officer or person authorized to demand and receive the same," consequently this case stands in the position, so far as this crime is concerned, of having had no legal existence until the demand was made, or otherwise this language cannot be understood. Therefore we are led to the conclusion, based upon this very language and the language of that Act of Assembly, that until a legal demand was made by a party who was authorized to make it and receive the money,

the Defendant was not called upon to pay over, and that is exactly what the Supreme Court says, and the crime is not completed. Consequently the crime that he is now called upon to answer for had no legal existence till after that demand was made. That is an additional reason why we cannot sustain the plea of former acquittal of the crime now charged in this indictment.

We want to assign another reason, speaking now, of course, of the three counts, four, eight and twelve, not of the other ten,
39 and the position of this record to-day is this, that there is neither a conviction nor an acquittal. The Supreme Court have set that verdict aside, and therefore I fail to see where there is any record showing a former conviction of any crime charged in these particular counts. It is wiped out as completely as though it never existed, and that, I think, is an additional reason why we cannot hold that this record which is presented to us shows a state of facts which bars a prosecution of the offence charged in the indictment now before us. Of course the clerk will note that this entire record is before the Court, and also that under the pleadings it appears that the Defendant is the same party named in the other indictment, so that everything that is necessary for him to raise hereafter, which should become necessary, will appear upon the record.

We therefore overrule the plea, sustain the demurrer, or give judgment for the County.

Defendant excepts. Bill sealed.' "

"Sixth. The Court erred on the general plea of *autrefois acquit*, in charging the jury and in directing a verdict for the Commonwealth, which charge and verdict are as follows (See pp. 21, 22, 23, 24 and 25, Charge of the Court):

'Gentlemen of the Jury: Before we instruct you on the question of guilt or innocence in this case, we think and believe after a most patient and careful investigation and careful reflection, that we are called upon, in the discharge of our duty, to dispose of the question of former acquittal, that is, of the Defendant's plea of former acquittal. In this very case the Defendant by reason of the existence of a record in the Quarter Sessions against him, in which he was previously tried, filed a plea setting up that he had heretofore been acquitted of the offence with which he is now charged. To this plea the Commonwealth filed a demurrer, denying that the record was sufficient to establish such alleged fact. We believed and still believe that, under these circumstances,
40 it was our duty to examine the record of both the present case and the previous case, and anything that was before us in the shape of evidence on that plea, and determine whether or not it showed that this Defendant had ever been charged with the same offence for which he is now charged. We arrived at the conclusion that the offence named in the previous or first indictment and the offence named in this indictment, were two separate and distinct offences, and we so stated, and directed judgment to be entered in favor of the Commonwealth, after which you were

selected as the judges between the Commonwealth of Pennsylvania and this Defendant, and again the Defendant offered in evidence the same record, having again set up as part of his plea that he had formerly been acquitted, notwithstanding the fact that the record showed the judgment of the Court on the evidence presented, to the contrary. Possibly the Court would have been right if it had rejected the offering of this record, upon the ground that it had already been adjudicated in this very case, upon pleas that were competent and regular, but we felt if there was any other evidence in the possession of the Defendant, which he could offer in addition to that record, that would tend to show that he ever had been heretofore tried for this crime, that he should have every opportunity possible to present it, and hence we allowed the record to be given in evidence, and permitted any evidence to be offered that the Defendant might have, tending to show that he had already suffered for this alleged offence, or that he had been acquitted whichever of the two positions he might see proper to take.

Now we have before us nothing excepting the very same record the same indictment, same record; I do not know of any other testimony offered in this case that affects that record, excepting that which appears in the record, and comparison with the record in this case——

Mr. REILLY: I would call your Honor's attention to the
41 fact that the Commonwealth's own evidence shows, in the statement of the Defendant accompanying his return to the Controller filed in January 1903, offered by the Commonwealth as evidence to show the moneys in the hands of the Defendant, that they were the same identical moneys that were set out in the former indictment, and that was the reason that we did not offer any evidence.

The COURT: I take it that in part the money spoken of in the previous indictment and the present indictment refers to the same collections of license moneys or moneys for transfers; and it forms, possibly, a part of the money that is now mentioned in this indictment; but anything that was before the Court before, contained in the indictment (and we had the record before us), does not change anything which is in the indictment now, so far as it names an amount and specifies for what purpose it was given. Now under these papers I have presented to me the opinion of the Supreme Court right in this case, between the Commonwealth and this Defendant, when the previous indictment was before the Supreme Court. The Supreme Court there say that there was no right in the Controller, or the County, rather, to demand any money from this Defendant before the civil suit had been decided, and at the time that that demand was made in December, 1902, the civil suit was pending undetermined. Therefore it reversed the action of the previous trial, because no crime had been committed when he was tried. I have given that opinion the most careful consideration I am capable of giving, and I always cheerfully yield obedience to the instructions of our higher Courts, for I believe that the liberties

and rights of property and life depend upon the honest adherence to the rulings of the judicial branch of our government, and it is my ambition to properly understand their rulings and keep within them and carefully observe the same, without regard to consequences either way. Therefore after such examination, I am led to this conclusion, that when *that when* that opinion was filed in
42 the Supreme Court of Pennsylvania, and subsequently here, and the proceedings of the previous trial were reversed, there was no crime that this Defendant was called upon to answer for, because the Supreme Court declared that the demand that had been made upon him was illegal, had no right to be made, and he was not bound to obey it, and therefore not bound to pay over the money when they called on him in December, 1902, because the County had no right to call on him then for this money, but they were bound to wait until after the Supreme Court, as well as this Court, decided the question of whether or not he had any claim or right to that money. They did decide that subsequently, and they said in their decision that he had no right to any of the money; that it belonged to the County of Schuylkill, like the other fees of the office he held.

Now, gentlemen of the jury, under this state of facts, I come to the conclusion that there was no crime to try when he was tried before; that the crime that is now tried in this indictment exists only since the actual demand was made, which the language of that Supreme Court opinion requires to be made before he is required to pay over. Justice Brown says, "We may recognize a judgment as a constructive demand in a civil proceeding, but not so in a criminal case, where a party is called upon to pay over when legally thereunto required." That is the language of Justice Brown, and it is the language of that Act of Assembly. For these reasons I am led to the conclusion that the offence we are now trying is not the offence for which he claims to have heretofore been tried and consequently that his plea of former acquittal cannot be sustained upon anything that is before us. Under these circumstances, and in view of what has already occurred in this case, to which I have referred, I esteem it as my duty to say to you that you should find in favor of the Commonwealth on the issue of former acquittal; in other words, I direct that to be your verdict, as being a proper and required discharge of duty upon my part, and the Clerk having taken that verdict, I will
43 then address you on the question of guilt or innocence, and whatever other questions are raised.

Mr. REILLY: I would like to call you- Honor's attention to the fact that the record shows that this same evidence to which I referred, in the statement accompanying the return to the Controller, was offered in evidence on the former trial, and I now ask for an exception to your Honor's ruling, and that a bill be sealed before verdict.

The COURT: Certainly, we will grant you an exception. You will have every opportunity of questioning anything we may say or do in the matter, in the higher Court.

Before verdict, counsel for Defendant excepted to the foregoing charge of the Court, and requested that the same, together with the

testimony in the case, be transcribed from the stenographer's notes and filed of record.

Granted. Bill sealed.

The jury then rendered the following verdict: "On the issue of former acquittal, we find in favor of the Commonwealth."

The following is the Opinion of the Superior Court on said assignments:

"The record offered in evidence did not show an adjudication that the Defendant had not received the money, nor that, having received it, he had paid it over. It did show an adjudication by the court of last resort that the Defendant had the right to retain this money and could not legally be required to pay it over until the 4th day of May, 1903. The agreement in the nature of a case stated, which was thus conclusively determined to vest in the Defendant the right to retain these fees until the question of their ownership was determined by Supreme Court, was made, executed and filed of record in the Court of Common Pleas of Schuylkill County on November 21st, 1901. The fees involved in the present indictment were not received by the Defendant until after that date, a
44 part of them within two months and the remaining portion over a year after the agreement had been filed of record. The agreement was in force at the time the Defendant received the fees. There never was a time when a lawful demand could have been made upon the Defendant to pay these fees, until after the question of their ownership was determined by the Supreme Court on May 4th, 1903. This was dictinctly held with regard to the twelfth count of the indictment in the former proceedings, which distinctly charged the receipt of the fees to have been in January, 1903, and which was supported by evidence that the money was actually received by the Defendant in December, 1902, and that he acknowledged said receipt in his official return on the first Monday of January, 1903.

The Defendant had received the money in question by virtue of his office. When the question of its ownership was determined by the decision of the Supreme Court on May 4th, 1903, it became his duty to pay the money to the county treasurer, but his failure to pay it did not, under the provisions of the 65th section of the Act of March 31st, 1860, become criminal until after the county treasurer had made demand. When the treasurer did make such demand, the offense was complete. The instruction of the Court below to the jury to render a verdict in favor of the Commonwealth upon the issue raised by the plea of *autrefois acquit* was, under the record, and evidence presented, correct; Solliday *v.* Commonwealth, 28 Pa. 13, and the cases hereinbefore cited. In this view of the case we do not deem it necessary to consider the question of the constitutionality of the Act of June 12th, 1878, P. L. 196, section 6, nor whether the period of limitation of prosecutions in cases of this character is by that statute extended for four years. All the assignments of error are dismissed.

The judgment is affirmed, and it is ordered that the Defendant appear in the Court of Quarter Sessions of Schuylkill County and by that Court be committed until such part of the sentence as had not

been performed when this appeal was made a supersedeas, be complied with."

45 *Petition to Advance Hearing.*

In the Supreme Court of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOHN T. SCHOENER.

Appeal from the Superior Court of Pennsylvania.

To the Honorable, the Judges of said Court:

The petition of Charles E. Berger, respectfully represents; That at the time of the trial of the above case in the Court of Quarter Sessions of Schuylkill County, and at the time of the argument in the Superior Court, he was the District Attorney of said County and still is concerned for the Commonwealth.

That the above appeal was allowed on the — day of March, 1906, and that unless the argument of the same is advanced, will not be heard until the 17th. day of February, 1907.

That the defendant in the above case was convicted in the Court of Quarter Sessions of Schuylkill County on the 8th. day of September, 1905, of the crime of refusing to pay over the sum of Seven Thousand, Two Hundred and Forty Three Dollars and Twenty-eight cents ($7,243.28) in his possession, as Clerk of the Court of Quarter Sessions of the said County when thereunto legally required by the proper officer, to wit; the County Treasurer.

The said defendant took an appeal from the judgment in the said case to the Superior Court of Pennsylvania to No. 211, October Term, 1905, and the same was duly argued in the first week of December 1905, and the Superior Court affirmed the said judgment.

46 Your petitioner further represents that the case is one in which the public is interested and which, in the interest of the administration of public justice, should be determined as speedily as possible.

Your petitioner further prays that the argument of the said case may be advanced and fixed for such early date as your honors may deem proper, and he will ever pray, etc.

CHAS. E. BERGER.

Endorsement: 131 January Term, 1906 Page 15 Commonwealth *v.* Shoener, Appellant Petition to advance Filed Apr. 19, 1906 In the Supreme Court. Apl. 27, 1906 case advanced to week beginning May 14, C. E. Berger.

47 *Opinion of the Supreme Court of Pennsylvania.*

In the Supreme Court of Pennsylvania.

No. 131, January Term, 1906.

COMMONWEALTH OF PENNSYLVANIA
v.
JOHN T. SHOENER.

Appeal from Superior Court.

Filed June 27, 1906.

BROWN, *J.:*

But little need be said in affirming this judgment. The learned and careful trial judge correctly disposed of the questions raised by the appellant, and, in doing so, understood what was said in Commonwealth *v.* Shoener, 212 Pa. 527, just as we intended it should be understood. The same is true of the Superior Court, and to its clear opinion affirming the judgment below nothing can be profitably added.

In support of his plea of *autrefois acquit,* the appellant relies upon our reversal of the former judgment against him. The jury on the trial of the first indictment found him guilty of having failed to pay over the license fees in his hands after demand had been made upon him to do so. Our reversal of the judgment on that verdict did not acquit him of the offense charged against him in the present indictment. All that we decided was, that, as the county of Schuylkill could not, at the time the prosecution was instituted, have made a legal demand upon the appellant for the payment of the fees in his hands, the statutory offense of failing to pay over had not been committed. He was discharged from his recognizance simply because the prosecution against him had been instituted before the offense charged against him was or could have been committed under the admitted facts in the case. He was, therefore never in jeopardy. If, after his conviction, the court below
48 had arrested judgment on the verdict, he would have been in the same situation in which our reversal of it placed him, but he could not have pleaded the arrest of the judgment as a bar to a new indictment against him for an offense subsequently committed, for he never was in peril. As to this the authorities are without number. Equally unavailing is the plea of the statute of limitations. It was admittedly the duty of the appellant to pay over the moneys in his hands, when he learned, on May 4, 1903, that they belonged to the county; but his failure to perform that duty was not a crime, and, as long as he retained the moneys without a demand from the county that he pay them over, he was not committing the statutory offense for which he was prosecuted in the present proceeding. Failure to pay over was not an offense; failure to pay over on

demand was. The county, for any reason, might have indulged him, and, having done so, its indulgence, which kept him from committing crime, cannot, under the plea of the statute of limitations, be now turned into a shield by him to protect him from the consequences of his crime after his commission of it. When he was still legally liable to pay to the county the fees which he had collected, demand was made upon him to pay them over. When he failed to comply with that demand, he, for the first time, committed the offense charged against him in the present indictment, and from the time of his refusal to pay over, June 30, 1905, and from that time only, could the statute of limitations begin to run.

The judgment of the Superior Court affirming that of the court of Quarter sessions is affirmed.

49 *Certiorari.*

In the Supreme Court of Pennsylvania.

EASTERN DISTRICT OF PENNSYLVANIA,
City and County of Philadelphia, ss:

The Commonwealth of Pennsylvania to the Justice of the Superior Court of Pennsylvania, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of John T. Shoener from the Judgment in No. 211 October Term, 1905, affirming the Judgment of the Court of Quarter Sessions of the County of Schuylkill in No. 905 September Term, 1905, wherein Commonwealth of Pennsylvania was plaintiff and the said appellant was defendant, before you, or some of you, depending, do command you, that the record and procedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the Third Monday of February next (1907), so full and entire as in our Court before you they remain, you certify and send, together with this Writ that we may further cause to be done thereupon that which of right and according to the laws of the said state ought.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our Supreme Court, at Philadelphia, the Twenty-ninth day of March in the year of our Lord one thousand nine hundred and six.

[SEAL.] LEWIS C. GREENE,
Deputy Prothonotary.

Endorsement: 905 September Term, 1905—Q. S. Schuylkill Co.—Superior Court 211 Oct. Term, 1905—No. 131 January Term, 1906—Supreme Court—Commonwealth of Pennsylvania *v.* John T. Shoener, Appellant—Certiorari to the Superior Court of Pennsylvania—Returnable Third Monday of February, 1907—Rule on the appellee, to appear and plead on the Return-day of the Writ—Filed Mar. 29, 1906 In Supreme Court.—Joseph W. Moyer, James B. Reilly, William Wilhelm.

50 *Remittitur.*

In the Supreme Court of Pennsylvania, Eastern District, *sct.*

The Commonwealth of Pennsylvania to the Justices of the Quarter Sessions Court, County of Schuylkill, Greeting:

Whereas, By virtue of our writ of Certiorari from our Supreme Court of Pennsylvania for the Eastern District returnable in the same Court on the Third Monday of February, in the year of our Lord one thousand nine hundred and seven a Record was brought into the same Court, upon Appeal by John T. Shoener from your judgment made in the matter of No. 905 September Term, 1905, affirming the judgment No. 211 October Term, 1905, wherein Commonwealth of Pennsylvania was plaintiff and the said appellant was defendant. And it was so proceeded in our said Supreme Court, that the following judgment was made, to wit: The Judgment of the Superior Court, affirming that of the Court of Quarter Sessions, is affirmed. And the record and proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the Act of Assembly in such cases made and provided) ordered by the said Supreme Court to be remitted to the Court of Quarter Sessions for the County of Schuylkill aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we here remit you the Record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court, at Philadelphia, 29th day of June in the year of our Lord one thousand nine hundred and six.

LEWIS C. GREENE,
Deputy Prothonotary.

51 Endorsement: 905 September Term, 1905—Q. S. Schuylkill—Superior Court 211 October Term, 1905—No. 131 January Term, 1906—Supreme Court—Commonwealth of Pennsylvania *v.* John T. Shoener, Appellant—Remittitur—Att'y. $3.00.

52 *Petition for Reargument.*

In the Supreme Court of Pennsylvania, Eastern District.

No. 131, January Term, 1906.

COMMONWEALTH OF PENNSYLVANIA
v.
JOHN T. SHOENER, Appellant.

An appeal from the Superior Court of Pennsylvania, Philadelphia District, No. 211, October Term, 1905, the same being an appeal from the Court of Quarter Sessions of Schuylkill County, No. 905, September Term, 1905.

And now, July 10, 1906, comes the appellant, John T. Shoener, by his counsel, and respectfully moves the court that a reargument be ordered in the above stated case, for the following reasons:

First. In the opinion of Justice Brown, a copy of which opinion is hereto attached, the following is found:

"In support of his plea of *autrefois acquit*, the appellant relies upon our reversal of the former judgment against him. The jury on the trial of the first indictment, found him guilty of having failed to pay over the license fees in his hands after demand had been made upon him to do so. Our reversal of the judgment on that verdict did not acquit him of the offense charged against him in the present indictment. All that we decided was, that as the county of Schuylkill could not, at the time the prosecution was instituted, have made a legal demand upon the appellant for the payment of the fees in his hands, the statutory offense of failing to pay over had not been committed. He was discharged from his recognizance
53 simply because the prosecution against him had been instituted before the offense charged against him was or could have been committed under the admitted facts in the case. He was, therefore, never in jeopardy. If, after his conviction, the court below had arrested judgment on the verdict, he would have been in the same situation in which our reversal of it placed him, but he could not have pleaded the arrest of the judgment as a bar to a new indictment against him for an offense subsequently committed, for he never was in peril. As to this the authorities are without number.

It is respectfully submitted that the court has erred in stating that the defendant "never was in peril," for as a matter of fact, he was tried upon a valid indictment, in January, 1904, convicted and sent to jail in March 1904, and was only released by the supersedeas that permitted his case to be heard before the Superior Court. The Court of Quarter Sessions entered its judgment affirming the finding of the jury; and the judgment of the Court of Quarter Sessions was unanimously affirmed by the Superior Court.

"Accused is placed in jeopardy where he has pleaded and had been put on trial before a court of competent jurisdiction upon an

indictment valid and sufficient in form and substance to sustain a conviction."

12 Cyc. 261.

"The rule that if the prisoner *could* have been legally convicted on the first indictment, upon any indictment that *might* have been legally adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence were adduced at the trial of the first indictment or not."

Wharton, American Criminal Law, Vol. 1, Sec. 551.

"It is very evident that plaintiff can *never be tried again upon any charge* of which he might have been convicted upon the
54 first indictment * * * But the protection extends no further than the offence *charged* in the first indictment, or of which he might have been convicted under it." Hilands *v.* Commonwealth, 114 Pa. 380.

That appellant was tried before a court of competent jurisdiction, upon a valid indictment charging the same offence as that in the second indictment—failure to pay over license fees on demand by the proper officer—in which respect both indictments are similar, cannot, we submit, be seriously controverted. But the contention of the Commonwealth is that by offering a demand at a date subsequent to the first indictment, a new or different offence is created. If this contention be sound, then it is submitted there is no limit either to the time when such demand may be made, or the number of times a defendant may be tried. For, following this contention to its logical conclusion, then every time a demand is made, a new and distinct offence is thereby created, and neither the plea of statute of limitations or once in jeopardy would ever avail. Now the effect of the Commonwealth's demurrer to defendant's special plea was to admit all the facts therein averred. Commonwealth *v.* Dinkey, 17 Pa. 126; Commonwealth *v.* Trimmer, 84 Pa. 65.

The question then depends for determination upon the record. Heikes *v.* Commonwealth, 26 Pa. 513; Murphy *v.* Richards, 5 W. & S. 279.

Both indictments, then, are against the same defendant. Both aver the receipt of the same public moneys, during the same period of time, in the same official capacity. Both are for the same offence under the same section of the code—Sec. 65, Act of March 31, 1860—as is distinctly averred in defendant's special plea. (Appellant's paper book, Superior Court, Appendix, pages 15-30.) So
55 that it was necessary on the part of the commonweath to produce precisely the same evidence in all material respects, on the trial of the second indictment, that it did on the first. Under this state of facts, as revealed by the record, the court below should have overruled the demurrer filed by the Commonwealth and entered judgment of *respondeat ouster*. Solliday *v.* Commonwealth, 28 Penna. 13.

Again, as appears by said special plea, the first indictment charged

the same offence as that contained in the second indictment, differing only in date and giving name of the county treasurer who made demand; and both are in the language of the statute. Moreover, the first indictment, in its first, fifth and ninth counts, charged the offence in the exact language of said section, (See Commonwealth *v.* Mentzer, 167 Pa. 648) including the charge in said counts, "and did fail to pay over the same when thereunto legally required by the county of Schuylkill, through its duly authorized agents, to the treasurer of the county of Schuylkill, he being the proper officer authorized to demand and receive the same."

Attention is called here to the verdict as shown by the record (special plea, page 30) which acquits defendant on these counts, and therefore presents a different question from that which might exist otherwise. Now it will not be seriously disputed that for any of the specific acts enumerated in the statute and charged in the first indictment, other than the failure to pay over, this defendant could never be tried again, and that as to those acts and counts, both the plea of the statute of limitations and *autrefois acquit* would avail against a second indictment. And your Honors have solemnly declared that legally he should have been acquitted of all charges under the first indictment. Commonwealth *v.* Shoener, 212 Pa. 527.

Had the verdict been one of acquittal, it is conceded, as already stated, that he could not be tried again. Shall he then be made to suffer for the error of the learned trial judge, and be denied and deprived of the benefit of a sacred right secured to him by
56 the law of the land? This court has decided, in the case of Commonwealth *v.* Stimmerling, 156 Pa. 400, that a verdict of not guilty though reached through the error of the court, cannot be disturbed. And we submit the same rule will enure to a defendant's benefit who is deprived of such a verdict.

Upon what principle then, can it be held that a second indictment would stand as to the charge of failure to pay over? Surely, it presents a construction of the act that is most incongruous and contravenes a great maxim of criminal jurisprudence that the courts have for centuries sacredly observed. If it be conceded, as it is, that appellant cannot be tried a second time under said section 65 on the charge of converting these moneys, or of investing the same, or of being a defaulter—by what rule of law or logic can he be tried on the charge of failure to pay over? It can only be done by setting aside all of the essential ingredients of the offence as charged in the indictment, and arbitrarily holding that because another demand was made that a new and different offence was created. An examination of all the decisions cited and relied upon by the learned court below and honorable Superior Court, will show that it appears upon the face of the record itself that the offence charged in the second indictment was a different one from that charged in the first, as instanced in the case of Commonwealth *v.* Trimmer, 84 Pa. 65, where the offence was making false and forged returns of an election from entirely separate and independent dis-

tricts. Or the case of Commonwealth *v.* Brown, 28 Superior Ct., where the charge was for forging separate and distinct promissory notes. Whereas, as above shown, the record here shows the same offence, *verbatim, et literatim, et* et*punctuatam,* throughout, save only as to the time of the alleged demand.

Neither, we submit, can the reversal of the judgment affect the vital questions here. While it is true, as stated in the opinion of Mr. Justice Brown, that it has been repeatedly decided that
57 the reversal of the judgment defeats the plea, yet an analysis of all these decisions will show that the rule applies only where there was some defect in the indictment, or a lack of jurisdiction in the court; and in all those cases in which the court arrested judgment and the defendant was subsequently tried, it will be found that the ground on which the court arrested judgment was either that the indictment was defective, or that the court was without jurisdiction in the first instance. No such condition exists here. The indictment was good and sufficient in law; the trial thereon was in a court of competent jurisdiction; and the defendant could have been—might have been—legally convicted. That brings the case within the well established rule of once in jeopardy. When the commonwealth preferred this charge against the defendant on a valid indictment, and forced him to trial in a competent court, it staked its all on the result, and when it failed, for whatever reason, to bring about his legal conviction, then its chance is gone forever. As said by this honorable court, in the case of Hilands *v.* Commonwealth, 111 Pa. 1, "The great safeguard which the organic law has thrown around the prisoner cannot thus be set at nought, to correct any error committed by the judge during the trial of the cause. * * * It is better that one guilty man escape than to disregard the mandate of the constitution, and establish a precedent which might result in many unjust convictions in the future."

Second. From what can be gleaned from the opinion of Justice Brown, the statute of limitations is to be determined by the time of the demand, to wit, June 30, 1905. The language of the court on that question is as follows:

"Failure to pay over was not an offence; failure to pay over on demand was. The county, for any reason, might have indulged him, and having done so, its indulgence, which kept him
58 from committing crime, cannot under the plea of the statute of limitations, be now turned into a shield by him to protect him from the consequences of his crime after his commission of it. When he was still legally liable to pay to the county the fee which he had collected, demand was made upon him to pay them over. When he failed to comply with that demand, he, for the first time, committed the offense charged against him in the present indictment, and from the time of his refusal to pay over—June 30, 1905—and from that time only, could the statute of limitations begin to run."

It was conceded on the trial of this case that the period of the

statute of limitations applicable is two years; and it appears on the face of the record that the indictment was not found until after that period had elapsed, either from the time defendant received the moneys and went out of office, or from the time this court decided that said moneys belonged to the county of Schuylkill. The Commonwealth pressed to trial on the first indictment, through the court below, the Superior Court and this court with vigor, insisting that the trial was regular and legal. But when the judgment was arrested by the decision of this court, then it sought to repair the mistake that was made, by instituting a second prosecution. Can this be done, after the lapse of the statutory period? If so, then there is no period of time which will measure the running of the statute, for the demand and prosecution may be made and brought after a lapse of twenty years, as well as after the lapse of two years. Such a doctrine violates all the well established principles that underlie the statute of limitations, and embezzlement does not consist in withholding or retaining money, but is dependent upon a demand. In that event, Pennsylvania will hold a novel position among the states, because it is universally held: "The period of limitation commences in
59 embezzlement from the date of the actual misappropriation, and not from the date when the accused was called upon to account." 12 Cyc. 255.

All cases set forth in that Cyclopaedia from other states support that proposition, that the embezzlement starts from the date of the actual misappropriation; and there is no doubt that the duty devolved upon the defendant to pay over the money when his liability was fixed by the decision of this court in May 1903, which was more than two years and four months prior to the bringing of this indictment. To hold otherwise would present this anomaly—that under the said sixty-fifth section, a prosecution for conversion to his own use, investment in property, or being a defaulter would be barred after two years, but a prosecution for failure to pay over, under the same section, would be unlimited. This, we submit, would be contrary to the principles upon which the statute of limitations rests.

"Where the alleged offender is accessible to justice, prosecutions should not be unnecessarily delayed; such delays do not often take place from worthy motives; charges are often kept suspended over the heads of the accused to subserve the ends of the accuser, and the accused kept in a state of moral slavery, to which no human being should be subjected. Report on Penal Code, Brightly's Purdon's Digest, Vol. 1, p. 496, Note C. All of which is respectfully submitted.

JAMES B. REILLY,
WM. WILHELM,
Att'ys for Petitioner.

60 In the Supreme Court of Pennsylvania, Eastern District.

No. 135, January Term, 1906.

COMMONWEALTH
v.
JOHN T. SHOENER.

Per Curiam:

October 22, 1906, Reargument refused and it is ordered that John T. Shoener, appellant and defendant below, forthwith surrender himself to the keeper of the jail of the County of Schuylkill to serve such portion of his sentence as has not been served on July 11, 1906.

Endorsement: No. 131 January Term, 1906. Commonwealth *v.* John T. Schoener *Per Curiam.* Filed Oct. 22, 1906 Supreme Court W. D.

61 *Petition for an Allowance of Writ of Error to the Supreme Court of the United States.*

In the Supreme Court of Pennsylvania.

To the Honorable James T. Mitchell, Chief Justice of the Supreme Court of Pennsylvania:

The petition of John T. Shoener respectfully shows that on the 27th, day of June, A. D. 1906, the Supreme Court of the State of Pennsylvania rendered a final judgment against your petitioner in a certain cause, wherein the Commonwealth of Pennsylvania was plaintiff and your petitioner was defendant, the said judgment so rendered being: "The judgment of the Superior Court affirming that of the Quarter Sessions is affirmed," which judgment of the Court of Quarter Sessions of Schuylkill county, Pennsylvania is: "October 23rd, 1905, The court sentence defendant, John T. Shoener, to pay a fine of $7,243.28 equal to the amount embezzled, and that he undergo punishment in the Schuylkill county prison by separate and solitary confinement at labor for two years and six months from this date", as will appear by reference to the record and proceedings in said case; and that the judgment of affirmance was rendered by the Supreme Court of Pennsylvania, the highest Court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States, by writ of error, under Section 709 of the Revised Statutes of the United States, because his Constitutional rights under amended Article five of the United States Constitution—wherein it states "nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb"

62 —have been denied your petitioner, inasmuch as in the same matter in which a judgment is now entered against him, he

was tried under a valid indictment, and acquitted and discharged by a judgment of the Supreme Court of the State of Pennsylvania, and in this case entered a plea of *Autrefois acquit;* and that the facts upon which he claimed acquittal by virtue of being once before in jeopardy, as is shown by the records, are as follows:

Your petitioner was elected Clerk of the Court of Quarter Sessions of Schuylkill county, Pennsylvania, at the general election held in November, 1899, and entered upon the duties of his office the first Monday of January 1900. He served out his term, which expired January 5th, 1903. Your petitioner set up a claim for the license money, under Section three, pages 469, 470, Pamphlet Laws of Pennsylvania of 1897; It was finally decided by the Supreme Court of Pennsylvania, in May, 1903, that the license moneys belonged to Schuylkill county. Jan. 3, 1903 the Controller of Schuylkill County instituted criminal proceedings against your petitioner, and charged him with embezzlement. November 14th, 1903, a valid bill of indictment containing thirteen counts was found, each of which charged embezzlement in one form or another under the Act of March 31st, 1860, relating to embezzlements by public officers. January 4th, 1904, the case was called for trial. January 8th, 1904, the jury returned a verdict of guilty on the fourth, eighth and twelfth counts. The motion in arrest of judgment and for a new trial was overruled February 29th, 1904, and the defendant was sentence- on March 7th, 1904, on the eighth and twelfth counts of the indictment. In pursuance of that sentence he was sent to jail and remained there
63 until a supersedeas was granted to have the case reviewed by the Superior Court of Pennsylvania. The said Superior Court sustained the Court of Quarter Sessions of Schuylkill county, Pennsylvania. September 19th, 1904, the Supreme Court of Pennsylvania allowed an appeal from the Superior Court, which was entered to Number 286 January Term, 1904. On June 22, 1905, judgment was rendered by the Supreme Court of Pennsylvania, reversing the Superior Court and the Quarter Sessions Court, and directing that defendant be discharged from his recognizance. August 30th, 1905, one A. J. Shortall, a representative of what is known an The Taxpayers' Association of Schuylkill County, Pennsylvania, swore out a warrant for the arrest of your petitioner for embezzlement, for the identical funds for which he was tried in January 1904, and as to which the Supreme Court of Pennsylvania, by its judgment just recited, directed that your petitioner be discharged from his recognizance—the indictment in the present case being for the same funds and in practically the same language as that for which he was formerly acquitted and discharged, there being only this difference: The language of the fourth, eighth and twelfth counts of the indictment in the former trial, covering the three years for which he was tried, is, "did fail to pay over the same when thereunto required by the County of Schuylkill or its legally authorized officers, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same." While the language in the latter indictment, which embraces the same three years
64 in one count, is: "did unlawfully fail to pay over the same unto the aforesaid Treasurer when thereunto legally required

as aforesaid by F. J. Noonan Treasurer of the County of Schuylkill, he the said F. J. Noonan being the proper officer authorized to demand and receive the same."

Your petitioner raised the question of twice in jeopardy by his plea of *autrefois acquit;* and that plea constituted an assignment of error that was reviewed by the Supreme Court of Pennsylvania. In the plea of *autrefois acquit* there was set out at length the former indictment, and the judgment of the Supreme Court of Pennsylvania, whereby your petitioner was acquitted and discharged—all of which appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will ever pray, etc.

PETITIONER.
JNO. T. SHOENER,
Attorney for Petitioner.

STATE OF PENNSYLVANIA, *County of Schuylkill, ss:*

John T. Shoener, the petitioner above named, being duly sworn according to law does depose and say that the facts set forth in the foregoing petition are true and correct.

JNO. T. SHOENER.

Sworn and Subscribed before me this 5th of July, A. D. 1906.
[SEAL.] PETER A. McCABE,
Justice of the Peace.

My Commission expires May 1, 1910.

65 Endorsement: Commonwealth *v.* Shoener Filed Oct. 25, 1906 Supreme Court W. D. Oct. 25, 1906 *Writ of error to the Supreme Court of the United States refused there being in my opinion no federal question involved.* Mitchell, C. J. Wm. Wilhelm, Attorney at Law Pottsville, Pa.

66 Superior Court of Pennsylvania, at Philadelphia.

Among the Records and Proceedings of the Superior Court of Pennsylvania, sitting at Philadelphia, *inter alia,* the following is thus contained:

Appearance Docket.

Docket Entries.

No. 211, October Term, 1905.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff,
v.
JOHN T. SHOENER, Defendant.

William Wilhelm.

Appeal of Defendant—Q. S., 905; September Term 1905—from the judgment and sentence.

Supreme Court, 131, January Term, 1906.

March 29, 1905. Writ of Certiorari from Supreme Court of Pennsylvania filed and *eo die* Record sent to the Supreme Court of Pennsylvania.

Appeal from the Court of Quarter Sessions of the County of Schuylkill. Filed October 23, 1905.

Eo die. Certiorari exit, Retble. the first Monday of December 1905.

December 4, 1905. Record returned and filed.

Eo die. Assignments of error filed *In re* Petition for Supersedeas filed.

Now Oct. 23, 1905, it is ordered that the appeal taken in this cause shall operate as a supersedeas upon the defendant giving bail with one or more sufficient sureties in the sum of six thou-
67 sand dollars; bail to be taken and approved before the Court of Quarter Sessions of Schuylkill County or a judge thereof upon due notice to the District Attorney of the time and place of taking same. By the Court Charles E. Rice, President Judge.

December 4, 1905. Argued.

March 12, 1906. The judgment is affirmed, and it is ordered that the defendant appear in the Court of Quarter Sessions of Schuylkill County and by that court be committed until such part of the sentence as had not been performed when this appeal was made a supersedeas, be complied with. Opinion by Porter, J.

In the Supreme Court.

March 19, 1906. Petition for an allowance of an appeal from the Superior Court to Supreme Court filed on motion of William Wilhelm Esq., attorney for appellant.

March 23, 1906. Appeal allowed. *Per Curiam.*

68 *Appeal and Affidavit.*

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

Court of Quarter Sessions of the County of Schuylkill, Sept. Term, 1905.

No. 905.

COMMONWEALTH, Plaintiff,
v.
JOHN T. SHOENER, Appellant, Defendant.

Enter Appeal on behalf of John T. Shoener from judgment of sentence of the Court of Quarter Sessions of the County of Schuylkill.

WM. WILHELM,
Att'y for John T. Shoener.

To Alex K. McClure, Prothonotary, Superior Court—Sitting at Philadelphia.

COUNTY OF PHILADELPHIA, *ss:*

Wm. Wilhelm being duly affirmed saith that said Appeal is not taken for the purpose of delay, but because appellants counsel believe he the defendant has suffered injustice by the judgment of sentence from which he appeals.

WM. WILHELM.

Affirmed and subscribed, this 23rd day of October A. D. 1905.
LEWIS C. GREENE,
Deputy Prothonotary.

Endorsement: No. 211 October Term, 1905 Superior Court of Pennsylvania Sitting at Philadelphia Commonwealth *v.* John T. Shoener, Appellant Appeal and Affidavit Filed Oct. 23, 1905 in the Superior Court. William Wilhelm, Attorney for Appellant.

69 *Præcipe for Certiorari.*

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

No. 905.

COMMONWEALTH
v.
JOHN T. SHOENER, Appellant.

Certiorari to the Court of Quarter Sessions of the County of Schuylkill of Sept. Term, 1905.

Issue Certiorari to the Court of Quarter Sessions of the County of Schuylkill to bring up record and proceedings in a certain action in said Court No. 905 Sept. Term, wherein The Commonwealth is Plaintiff and John T. Shoener Defendant Returnable to next Term Sec. Reg.

WM. WILHELM,
Attorney for Appellant.

To Alex K. McClure, Prothonotary, Superior Court, Sitting at Philadelphia.

Endorsement: No. 211 October Term, 1905 Superior Court of Pennsylvania Sitting at Philadelphia Commonwealth *v.* John T. Shoener, Appellant Præcipe for Certiorari. Filed Oct. 23, 1905 in the Superior Court William Wilhelm, Attorney for Appellant.

70 *Assignments of Error.*

In the Superior Court of Pennsylvania.

First. The court erred in overruling the third paragraph of defendant's demurrer, which paragraph and ruling are respectively as follows (See Appendix page 8 and 12 to 15):

Third. That the offense charged in said indictment is barred by the statute of limitations, the same having been found more than two years after the moneys alleged to have been received by the defendant, and which he failed to pay over, came into his hands."

Answer. As to the third cause of demurrer which raises the question of the statute of limitations, alleging "that the offence charged in said indictment is barred by the statute of limitations, the same having been found more than two years after the moneys alleged to have been received by the defendant, and which he failed to pay over, came into his hands," if we believed, under the particular circumstances of this case, that the statute of limitations began to run from the time that he received this money, as this

clause says, we would be disposed to sustain this proposition, but we cannot accept that view of it under the decision of the Supreme Court in this particular case. If that were correct, of course two years from the time the money reached his hands, a good part of which had reached his hands back in 1900, according to the indictment or some of it at least in 1900 and 1901—as to that money the right to prosecute would have been barred long ago, and before the Supreme Court ever decided the previous trial, which we think is not the case, and which we think is plainly indicated by the language of the Supreme Court. Now in this opinion it is held that the demand made in December 1902 was not authorized; that it
71 could not be made, because the civil proceeding had not then been decided. It had been decided in this court, but it was pending in the higher court. Subsequently they affirmed the action of this court, but Mr. Justice Brown in delivering the opinion of the Supreme Court says that it was competent for these parties to make the agreement known as the case stated, during the pendency of which the defendant could not be called upon to pay over the money, until there was a determination deciding which of the parties claiming it had a right to it, whether the County of Schuylkill or the defendant. He thereby recognized the right of the parties to suspend the making of the demand, and enforces that right in favor of the defendant, to the extent of preventing the county from making or holding that the county could not make such a demand, during the existence of that civil proceeding; and then, in discussing that, he points out, as we understand the ruling of the court, what character of demand will be considered sufficient in a criminal case, such as this, under the circumstances of this particular case, and we will read a portion of this, as indicating the kind of demand that would be required: "The learned trial judge charged the jury that the institution of the suit in the common pleas of the county was a legal demand for the payment of the money, and should be regarded as such demand in the prosecution of the appellant on the counts charging him with failing to pay over on demand. In the civil courts constructive demands may be and are recognized, but not so in a criminal court, in the prosecution for an offense having as one of the statutory ingredients a refusal to pay on demand." Now the act says, "or fail to pay over the same when thereunto legally required by the state, county or township treasurer or other proper officer or person authorized to demand and receive the same." Justice Brown says "A demand there means actual demand. The only actual demand that the commonwealth pretends to have made
72 was the controller's letter. It was written after the institution of the civil suit, and after the distinct agreement by the county that the question of defendant's liability should be judicially determined. Before being so determined, there was no liability to be enforced against him civilly, and therefore no demand could be made upon him that he was bound to recognize," and then goes on to state that he had been acquitted of the other offenses. Under this language, we are led to the conclusion that until a demand was made after this decision, until a demand was made, no crime for failing to

pay over the money existed. We think that is a fair interpretation of the language of the Supreme Court. If, therefore, no crime existed for not paying this money over until after demand was made, it follows, in my judgment, that until that demand was made, there was no right of prosecution, and I do not know of any authority that holds that the right to prosecute can be barred before the right to prosecute exists; consequently I am led to the conclusion that the right to prosecute existed after the demand was made, and the alleged crime was committed when there was refusal to pay over that money, or a failure to pay it over after such demand, and that the statute of limitations, under this language, would seem to begin to run from that time, upon the proposition that it could not begin to run until the right to prosecute existed. Whether we are giving an interpretation of this case such as the higher court will place upon it, if the future of the case makes it necessary, we will only learn when they determine, but we are unable at this time, from anything that is now before us, to say that the right to maintain this prosecution is barred by limitation, under this language.

Mr. REILLY: Will your honor permit me to add, as an amendment to my third ground of demurrer, so that I may have the benefit of it on the record—it will not affect your honor's decision—
73 by including the words, "that the indictment was not found within two years from the time it was judicially determined, May 11th, 1903, that the defendant was liable for the license fees received by him."

The COURT: You can file that among your reasons.

Mr. REILLY: Your honor will note an exception and seal us a bill?

The COURT: Certainly.

Defendant excepts. Bill sealed."

Second. The court erred in its answer to defendant's first, second, third and fourth points, which points and answer are respectively as follows. (See pp. 33, 34, 35, and 36 charge of the court.)

1. That the law of this commonwealth relating to public officers, required that the defendant whilst clerk of the court of said county, on the first Monday of each and every month during his term of office, and the first Monday of the month next after the expiration of his term, pay to the county treasurer all fees received by him for applications for liquor licenses, and for the transfer of licenses for the preceding month, and to take duplicate receipts therefor, and deposit such receipts with the county controller, together with a transcript in detail of his fee and account book for the preceding month, under oath, and it was his legal duty to do so; if the jury find from the evidence that said defendant failed to pay over to the county treasurer said sum of $7243.28 mentioned in the indictment, or any portion therof, as and when so required by law, towit, the first Monday of January, 1903, the offense of failure to pay over under this indictment was then and there complete, and it immediately became the duty of the county treasurer to demand payment of the same, and his failure so to do could not stop the run-
74 ning of the statute of limitations in favor of the defendant, and their verdict should be "not guilty."

2. That the statute of limitations relating to such cases as this provides that all indictments for any such alleged crime or misdemeanor shall be brought or exhibited within two years next after such crime or misdemeanor shall have been committed, and not afterwards, and if the jury find from the evidence that the defendant at any time after the expiration of his term of office, the first Monday of January, 1903, had in his hands and failed to pay over $7243.28 license application and transfer money belonging to the county, or any part thereof, then demand by the county treasurer should have been at once made, and the commonwealth were bound to bring their indictment within two years from the time the county treasurer could have so legally demanded payment of said money, and having failed to do so as it appears on the face of the indictment, the statute of limitations would be a bar, and their verdict should be in favor of the defendant, "not guilty."

3. That the statute of limitations in this case began to run in favor of the defendant from the time the alleged crime was committed, which was, if at all, when the defendant failed to pay over to the county treasurer the license money in his hands as required by sec. 2 of the Act of 31 March, 1876, P. L. 13, and not when or after the payment of the same was demanded by the county treasurer June 30, 1905, and as the indictment shows on its face that it was found over two years from the time when the payment of said money could have been demanded and indictment found, the verdict of the jury must be "not guilty."

4. That any agreement or stipulation entered into between the county of Schuylkill and the defendant for the purpose of legally determining the legal ownership of said money or any part thereof in a civil proceeding in the courts of the state, did not arrest the running of the statute in favor of the defendant, but the
75 statute became a bar to this indictment in two years after the first Monday of January, 1903, when defendant's term of office expired, and he failed to pay over, and the verdict must be "not guilty." We will answer these four together. All these points bear upon the question of limitation as to when it begins to run. We have indicated an opinion heretofore during the progress of this trial. Briefly stated, in misdemeanors limitation begins to run from the time the crime was committed, or, in other words, from the time when a right of criminal action exists, and a prosecution may be legally instituted. In this case, the 65th sec. of the act of 1860 requires the defendant "to pay over the same when thereunto legally required," and the Supreme Court say such demand must be an actual demand. Until, therefore, he was required to pay over, until such actual demand was made, there was no crime committed. The evidence shows, he was so required to pay, on the 30th of June, 1905, and by an actual demand in writing, and hence we hold that to be the period from which the statute began to run, for the statute cannot begin to run in bar of a prosecution before the right of prosecution exists, and consequently we refuse these points.

Third. The court erred in its answer to defendant's ninth point

which point and answer are respectively as follows, (see p. 38 charge of the court):

9. It having been held by the Supreme Court at the former trial that the suit in the civil proceeding was no demand as was contemplated by sec. 65 of the act of 1860, and that no demand was made as was alleged in the indictment, but it having been determined on May 11, 1903 in the civil proceeding that the moneys belonged to the county and not to the defendant, the conversion if any there was took place immediately following the decision
76 of the Supreme Court, May 11, 1903. And if the commonwealth neglected for a period of two years, one month and nineteen days after the civil liability of defendant was determined, to make a demand, and for over two years and three months after the civil liability was determined, to find the indictment in this case, then the defendant cannot be convicted, as the statutory period of two years ran before either there was a demand, or the indictment was found.

Answer: We think this is answered in what we said to you in answer to points numbers 1, 2, 3 and 4, and we refer you to that which we then said as an answer to this point.

Fourth: The court erred in its answer to defendant's eighth point, which point and answer are respectively as follows, (see p. 37, charge of the court):

8. The gist of the offense in this charge is that of conversion, and as the defendant in this case, John T. Shoener, went out of office on the first Monday of January, 1903, and was contending at the time he was in office, and the time he went out of office, that the moneys alleged to have been embezzled in this case were his under the act of 1897, and that the question was not determined until May 11, 1903, more than two years and three months prior to the finding of this indictment, it being conceded that the statute of limitations is two years under sec. 65 of the criminal code of 1860, under which he is indicted the defendant cannot be convicted.

Answer: We say this. This point asks us to direct you to acquit the defendant. We cannot give such instruction from anything before us in this case, and we therefore refuse this point.

Fifth. The court erred in its answer to defendant's plea of *autrefois acquit*, which plea and answer are respectively as follows (See pp. 15 to 38, Appendix).

77 "In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

Indictment No. 905. September Sessions, 1905.

COMMONWEALTH OF PENNSYLVANIA
v.
JOHN T. SHOENER.

Charge.—Embezzlement, under section 65 of the act of 1860 with failure to pay over to the county of Schuylkill the sum of $7243.28. True bill, Monday September 4, 1905.

And now, September 6th, A. D. 1905, the defendant being brought before the court on the charge above stated preferred by the commonwealth, and having heard the said indictment, No. 905 September Term, 1905, read and the matters therein contained says that he ought not to be put to answer the said indictment, he having been heretofore in due manner of law acquitted of the premises specified and charged upon him therein, and for a plea to the said indictment he says that heretofore, towit, on the 4th day of January A. D. 1904 at a session of the court duly convened he was duly arraigned upon a certain valid indictment founded upon and under said section 5 act of March 31, A. D. 1860, upon which the present indictment was founded, which charged him, the said John T. Shoener in manner and form as follows:

In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

No. 175, March Term, 1903.

November T. 1903.

COMMONWEALTH
v.
JOHN T. SHOENER.

SCHUYLKILL COUNTY, *ss:*

The Grand Inquest of the commonwealth of Pennsylvania, inquiring for the body of the county of Schuylkill, upon their respective oaths and affirmations, do present and say that John T.
78 Shoener late of the said county, yeoman, heretofore towit at the general election, held by the qualified electors of Schuylkill County on the 7th day of November, A. D. 1899, was duly elected clerk of the Court of Quarter Sessions of the county of Schuylkill, to serve as such for the then next ensuing term, commencing on the first Monday of January 1900, and continuing thereafter for a period of three years. That the said John T. Shoener did accept the said election, and did file his bond and take the oath of office required

by law, and did on the first Monday of January, 1900, enter upon the duties of the said office as Clerk of the Quarter Sessions of the Peace for the County of Schuylkill, a county then and now containing upwards of one hundred and fifty thousand in population, and continued in said office and exercised the duties, powers, rights and privileges of said office in and for the county of Schuylkill until January 5, 1903.

That the said John T. Shoener as Clerk of the Court of Quarter Sessions aforesaid was by law authorized and required to collect and receive from each applicant for liquor license in said county, and from each applicant for a transfer of a liquor license previously granted the sum of $5. and was legally required on the first Monday of each and every month to pay to the treasurer of the county of Schuylkill all fees so received from the preceding month taking duplicate receipts therefor, which receipts he was required to deposit with the county controller, together with a transcript in detail of his fee and account book for the preceding month under oath showing a true and correct list of all such fees received as aforesaid.

1. The Grand Inquest aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener aforesaid on the 7th day of January A. D. 1901 and divers other days and times before and since at the county of Schuylkill, and within the
79 jurisdiction of this court with force and arms &c being then and there the duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public money, towit fees on liquor license applications, did by virtue of his said office of clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of the Clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect and take into his possession, certain moneys for fees on liquor license applications to a large amount, towit, $5380. of the value of five thousand three hundred and eighty dollars lawful money of the United States for and in the name and on account of the county of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, willfully and corruptly embezzle and convey to his own use the said public moneys so collected, received and taken into his possession, and did use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest the aforesaid sum of public moneys, and did prove a defaulter to the county of Schuylkill of the aforesaid sum of public moneys, and did fail to pay over the same when thereunto legally required by the county of Schuylkill through its duly authorized agents to the treasurer of the county of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania.

2. And the Grand Inquest aforesaid upon their oaths and af-

firmations aforesaid do further present that John T. Shoener
80 aforesaid, on the seventh day of January, A. D. 1901, and on divers other days and times before and since, and at the county of Schuylkill, and within the jurisdiction of this court, with force and arms &c, being then and there the duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the county of Schuylkill aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, towit, fees on liquor license applications, did by virtue of his said office of clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of clerk of the Court of Quarter Sessions of said county of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications to a large amount, towit, $5380. of the value of five thousand three hundred and eighty dollars lawful money of the United States for and in the name and on account of the county of Schuylkill of having so collected, received and taken into his possession for safe keeping and transfer as aforesaid, did fraudulently, wilfully and corruptly use by way of investment in property and merchandise, the character of which is to your Grand Inquest as yet unknown, the said public money so collected, received and taken into his possession, contrary to the form of the act of Assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania.

3. And the Grand Inquest aforesaid upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the 7th day of January A. D. 1901, and on divers other days and times before and since at the county of Schuylkill and within the jurisdiction of this court, with force and arms &c. being then and there duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the county of Schuylkill aforesaid, and as such
81 charged with the collection, safe keeping and transfer of public moneys, towit, fees on liquor license applications, did by virtue of his said office of clerk of the Court of Quarter Sessions of Schuylkill County aforesaid, then and there whilst acting and holding said office of clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications to a large amount, towit, five thousand three hundred and eighty dollars of the value of five thousand three hundred and eighty dollars lawful money of the United States, for and in the name and on account of the county of Schuylkill, and having so collected, received, and taken into his possession for safe keeping and transfer as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, contrary to the form of the act of Assembly, in such case made and provided and against the peace and dignity of the commonwealth of Pennsylvania.

4. And the Grand Inquest aforesaid upon their oaths and affirmations aforesaid do further present that John T. Shoener aforesaid, on the 7th day of January A. D. 1901 and on divers other days

and times before and since at the county of Schuylkill, and within the jurisdiction of this court, with force and arms &c. being then and there the duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the county of Schuylkill aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, did by virtue of his said office of clerk of the Court of Quarter Sessions of Schuylkill county aforesaid, then and there whilst acting and holding said office of clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect and take into his possession, certain public moneys for fees on liquor license ap-
82 plications to a large amount, to wit five thousand three hundred and eighty dollars of the value of five thousand three hundred and eighty dollars lawful money of the United States, for and in the name and on account of the county of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fail to pay over the same, when thereunto required by the county of Schuylkill or its legally authorized officers, to the treasurer of the county of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the act of Assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania.

5. The Grand Inquest aforesaid upon their oaths and affirmations, aforesaid, do further present that John T. Shoener aforesaid on the 6th day of January A. D. 1902, and divers other days and times before and since at the county of Schuylkill, and within the jurisdiction of this court, with force and arms &c., being then and there the duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the county of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit fees on liquor license applications and fees on applications for transfer of liquor licenses previously granted did by virtue of his said office of clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications, and fees for applications for the transfer of liquor licenses previously granted to a large amount, to wit six thousand five hundred and sixty-five dollars of the value of six thousand five hundred
83 and sixty-five dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill, and having so collected, received, and taken into his possession for safe keeping and transfer as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public money so collected, received and taken into his possession, and did use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest, the aforesaid sum of public moneys, and did prove

a defaulter to the county of Schuylkill of the aforesaid sum of public money, and did fail to pay over the same, when thereunto legally required by the county of Schuylkill through its duly authorized agents to the treasurer of the County of Schuylkill he being the proper officer authorized to demand and receive the same, contrary to the form of the act of Assembly in such case made and provided and against the peace and dignity of the commonwealth of Pennsylvania.

6. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener aforesaid, on the 6th day of January A. D. 1902, and on divers other days and times before and since at the county of Schuylkill and within the jurisdiction of this court with force and arms &c. being then and there duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys to wit, fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of the Clerk of the Court of Quarter Sessions of Schuylkill County aforesaid, then and there whilst acting and holding said office, of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on
84 liquor license applications, and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand five hundred and sixty-five dollars of the value of six thousand five hundred and sixty-five dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping as aforesaid, did fraudulently wilfully and corruptly use by way of investment in property and merchandise, the character of which is to your Grand Inquest as yet unknown, the said money so collected, received and taken into his possession, contrary to the form of the act of Assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania.

7. And the Grand Inquest, aforesaid, upon their oaths and affirmations aforesaid, do further present that John T. Shoener, aforesaid, on the 6th day of January A. D. 1902, and on divers other days and times before and since at the county of Schuylkill and within the jurisdiction of this court, with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect

and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand five hundred and sixty-five dollars of the value of six thousand five hundred and sixty-five dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer as aforesaid,
85 did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, contrary to the form of the act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

8. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the 6th day of January, A. D. 1902, and on divers other days and times before and since at the county of Schuylkill, and within the jurisdiction of this court with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain public moneys, for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand five hundred and sixty-five dollars of the value of six thousand five hundred and sixty-five dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fail to pay over the same when thereunto legally required by the County of Schuylkill, or its legally authorized officers to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

86 9. And the Grand Inquest aforesaid upon their oaths and affirmations, aforesaid, do further present that John T. Shoener aforesaid on the 5th day of January, A. D. 1903, and on divers others days and times before and since at the county of Schuylkill, and within the jurisdiction of this court with force and arms, &c., being then and there the duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, towit, fees on liquor license,

application and fees on applications for transfer of liquor licenses previously granted, did by virtue of his said office of clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of clerk of the Court of Quarter Sessions of the said county of Schuylkill receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit. Six thousand three hundred dollars of the value of six thousand three hundred dollars lawful money of the United States for and in the name and in account of the county of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, and did use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest, the aforesaid sum of public moneys and did prove a defaulter to the county of Schuylkill of the aforesaid sum of public moneys, and did fail to pay over the same, when thereunto legally required by the county of Schuylkill, through its duly authorized agents, to the treasurer of the county of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly
87 in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania.

10. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, on the fifth day of January, A. D. 1903, and on divers other days and times before and since at the county of Schuylkill and within the jurisdiction of this court, with force and arms, &c., being then and there the duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the county of Schuylkill aforesaid, and as such charged with the collection safe keeping and transfer of public moneys, to wit, fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of clerk of the Court of Quarter Sessions of Schuylkill county, aforesaid, then and there whilst acting and holding said office of clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand three hundred dollars of the value of six thousand three hundred dollars, lawful money of the United States for and in the name and on account of the county of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer as aforesaid, did fraudulently, wilfully and corruptly use by way of investment in property and merchandise, the character of which is to your Grand Inquest as yet unknown, the said public moneys so collected, received and taken into his possession, contrary to the form of the act of Assembly in such case

made and provided and against the peace and dignity of the commonwealth of Pennsylvania.

11. And the Grand Inquest aforesaid, upon their oaths and affirmations, aforesaid, on the 5th day of January, A. D. 1903, and on divers other days and times before and since at the county of Schuylkill, and within the jurisdiction of this court, with force and arms, &c., being then and there the duly elected and lawfully
88 commissioned clerk of the Court of Quarter Sessions of the county of Schuylkill aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of clerk of the Court of Quarter Sessions of Schuylkill County aforesaid, then and there whilst acting and holding said office of clerk of the Court of Quarter Sessions of the said county of Schuylkill receive, collect and take into his possession certain moneys for fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand three hundred dollars of the value of six thousand three hundred dollars, lawful money of the United States for and in the name and on account of the county of Schuylkill, in having so collected, received and taken into his possession for safe keeping and transfer as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, contrary to the form of the act of Assembly in such case made and provided and against the peace and dignity of the commonwealth of Pennsylvania.

12. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener aforesaid on the 5th day of January, A. D. 1903, and on divers other days and times before and since at the county of Schuylkill, and within the jurisdiction of this court with force and arms, &c., being then and there the duly elected and lawfully commissioned clerk of the court of Quarter Sessions of the county of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license ap-
89 plications and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of clerk of the Court of Quarter Sessions of Schuylkill County aforesaid, then and there whilst acting and holding said office of clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect, and take into his possession certain public moneys for fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted, to a large amount to wit six thousand three hundred dollars of the value of six thousand three hundred dollars lawful money of the United States, for and in the name and on account of the county of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer as aforesaid, did fail to pay over the same, when thereunto legally required by the county of Schuylkill, or its legally authorized officers to the Treasurer of the County of

Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the act of Assembly in such case, made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

13. And the Grand Inquest aforesaid, upon their oaths and affirmations, aforesaid, do further present, that John T. Shoener, aforesaid, on the 7th day of October A. D. 1902, and divers other days and times before and since, at the county of Schuylkill and within the jurisdiction of this court, with force and arms &c., being then and there the duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the County of Schuylkill aforesaid, and as such charged with the collection, safe keeping and transfer of public money, to wit, fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County aforesaid then and there whilst acting and holding said office
90 of Clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect and take into his possession certain moneys for fees on applications for the transfer of liquor licenses previously granted to a, large amount, to wit, one hundred and sixty-five dollars of the value one hundred and sixty-five dollars, lawful money of the United States, for and in the name and on account of the county of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, and use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest, the aforesaid sum of public moneys, and did fail to pay over the same when thereunto legally required by the county of Schuylkill, through its duly authorized agents, to the treasurer of the county of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

To which last mentioned indictment he did then and there plead Not Guilty, and on the same day a jury was empanelled and sworn to try the said issue between the Commonwealth and the said John T. Shoener, and the trial thereof was proceeded with in due course. On January 6, A. D. 1904, the said jury upon their oaths found as follows: "Verdict, guilty as to counts four, eight and twelve, and not guilty as to any of the other counts of the within indictment." Said trial and the proceedings had thereon were reviewed by the Supreme Court of Pennsylvania on appeal to Number 286, January Term, 1904, whereupon it was considered, adjudged and decreed by the said Supreme Court that the said John T. Shoener should
91 go thereof acquitted, as appears by the records of said proceedings now remaining here in court.

And the said John T. Shoener avers that the said John T. Shoener mentioned in said former indictment, and he, the said John T.

Shoener charged in this present indictment, are one and the same person, and not divers and different persons.

And the said John T. Shoener further avers that said sum of $7,243.28 mentioned in the above stated indictment as having been received by the said defendant, but which he is alleged to have refused to pay over when demanded by said F. J. Noonan, County Treasurer &c., was and is a part of, covered by and included in the said several sums of money mentioned in the said indictment, proceedings and judgment thereon to Number 175, March Term, 1903, and no other moneys whatever than those; that the misdemeanor and offense charged and laid in the former indictment, and the misdemeanor and offence in the present indictment mentioned are one and the same misdemeanor and offence, and not divers and different misdemeanors and offences, and this he is ready to verify.

Wherefore, defendent prays judgment of the court here, if he ought to be put further to answer the present indictment, and whether the Commonwealth ought to further prosecute or impeach him, the said John T. Shoener, on account of the premises in the present indictment contained, and that he may be dismissed, &c.

(Signed) JNO. T. SHOENER.

Mr. BERGER: We desire to demur to this plea.

The COURT: Demur to what this record contains, to the sufficiency of the record?

Mr. BERGER: Yes, sir.

The COURT: To sustain their plea?

Mr. BERGER: Yes, sir; I will read the demurrer to this special plea:

92 In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

905, September Sessions, 1905.

COMMONWEALTH
vs.
JOHN T. SHOENER.

Now, September 6, 1905, Charles E. Berger, District Attorney, who prosecutes for the Commonwealth, in answer to the matters and things alleged and pleaded by the defendant in his special plea filed, being the preceedings and discharge shown by the record of the Supreme Court to No. 286, January Term, 1904, says the same is not sufficient in law to bar the prosecution of the defendant on the indictment in this case, and this the Commonwealth is ready to verify by the said record at 286 January Term, 1904, and prays that the same may be inquired of by the court. Whereupon, for want of a sufficient plea on this behalf, he, the said Charles E. Berger, District Attorney for the said Commonwealth, prays judgment.

(Signed) CHARLES E. BERGER,
District Attorney.

We ask leave to file this demurrer to the plea.

The COURT: Yes, sir. In order that the Court may know what you charge or assert in this plea, must you not get the record before the court?

Mr. REILLY: We must prove that, yes.

The COURT: The court can only decide upon the record, and that must come before the court.

Mr. REILLY: The effect of the filing of the demurrer in law, is to admit all the averments in our plea.

The COURT: The demurrer filed here admits the existence of this record and says, even if such record does exist, that is not sufficient.

Mr. REILLY: It admits all the averments in our plea, that we were tried once before and acquitted upon the same charge.

93 The COURT: Oh no, if it admits that, what is the use in having any record? What is the use of arguing anything?

Mr. REILLY: The plea of *autrefois acquit* is the same as any other plea.

The COURT: The offense charged in the indictment now before us is drawn under this language in the 65th section of the Act of 1860: "Or fail to pay over the same when thereunto legally required by the state, county or township treasurer or other proper officer or person authorized to demand and receive the same." We have before us a plea of former acquittal on the part of the defendant as against this charge, by reason of the trial on the previous indictment, and we want to say now that this record, as now presented to us, shows a trial of this same defendant on an indictment charging him in thirteen different counts. Of the thirteen counts contained in that indictment, he was acquitted of the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh and thirteenth. Nine of these counts, b... the ones first named, or all those excepting the thirteenth, charge him with embezzlement, and the conversion of money to his own use, received for license fees. The thirteenth charges him with a like offence, excepting that it was for moneys received for transfers. The fourth, eighth and twelfth charge him simply with having failed to pay over the license fees "when thereunto legally required by the County of Schuylkill or its legally authorized officers, to the Treasurer of the County of Schuylkill."

Now, in the first place it is contended on the part of the defendant, as we understand his counsel, that the ten counts, or some of the ten counts of which he was acquitted, contain the charge of failing to pay over the moneys that he received in his office as an official, license moneys for licenses and for transfers. We cannot accept this construction of the first indictment nor of the contents of these particular counts. It would lead to a somewhat awkward

94 position to say that the defendant had first or during the trial been acquitted in these counts of not paying the money over, and then convicted on the fourth, eighth and twelfth, of not paying it over, or, in other words, both convicted and acquitted in the same trial and on the same indictment. We think if any such construction as this could be placed on the counts as contended for by defendant, the Supreme Court, when this case was before them, or

the former case, instead of simply saying that there was no demand would have said that the result of a verdict of not guilty on the other nine or ten counts, or whatever number of them are claimed to charge this same offense, would be such that he could not be convicted on the fourth, eighth and twelfth, but that he must be regarded as acquitted of all. This would be exactly in line with the contention in Commonwealth *v.* Wiederhold, 112 Pa., where in our own county, in the first count they charged the party with arson, and in the second count intended to charge him with firing a building not a part and parcel of a dwelling house, but omitted the word "not," leaving it standing exactly the same as the charge contained in the first count, and it was held by the Supreme Court that he was acquitted, and I think such would be the effect if the counts named in this indictment that I have named as being the ones of which he was acquitted, charged the same offense, or if any one of them did charge the same offense that was found in the fourth, eighth and twelfth. But we cannot regard the counts as charging the same offense. We believe that the fourth, eighth and twelfth, just as the Supreme Court says in its opinion, charge nothing excepting a failure to pay over.

Now it is claimed—it being admitted, of course, that this defendant is the same party who was defendant in the former indictment—that the trial of the former charge was a trial of the same charge that is now contained in the present indictment against
95 him. We will refer to but two authorities because in those authorities there are numerous other authorities referred to, and we will not take the time to refer to all of them. First, we refer to the case of Commonwealth *v.* Tadrick, 1 Sup. 564, beginning with this portion: "Returning to the plea of *autrefois acquit*, it was held in Heikes *v.* Commonwealth, 26 Pa. 513 (citing People *v.* Bauste, 1 John. 66), that "the true test to ascertain whether the plea of *autrsfois acquit* be a good bar is, whether the evidence necessary to support the second indictment would have been sufficient to secure a legal conviction on the first.'" This is made one of the tests. And we think we need not say that the evidence necessary to sustain a conviction on this indictment would not sustain a conviction on the previous indictment. Because it would leave as absent one of the elements of the crime. It would leave the previous indictment standing without any demand, and without the demand there would be no crime, and a demand made af-er that prosecution was instituted and the indictment found could not be presented upon the trial of that case. Therefore, the evidence would not sustain a conviction on the first count of the indictment; that is, the evidence that would be necessary for a conviction, under this language, "The true test to ascertain whether the plea of *autrefois acquit* be a good bar is, whether the evidence necessary to support the second indictment would have been sufficient to secure a legal conviction on the first,"—we say the evidence necessary to support the second indictment would not procure a legal conviction on the first, because the evidence would not be admissible, and the crime would have no legal existence, there being no demand.

Now we will take the case in 84 Pa. (Com. *v.* Trimmer, 84 Pa. 65), because these cases seem to be a statement of the principle
96 in the reverse order, one the opposite of the other. "Whether the former acquittal was for the same offense depends on the record pleaded, and not on the argument or inference deducted therefrom. The defendants plead in bar a former trial on one other indictment than the one set forth in the plea. If that record shows that the evidence necessary to support a conviction on the present indictment would have been insufficient to procure a legal conviction on the former, the plea of *autrefois acquit* is not sustained." That is the reverse statement. For the reason that we have just given, it must necessarily follow that such would be the case, and that it could not be held as a plea under this rule; and this case also shows that it is the duty of the court, under such circumstances as these, to declare the effect of that which has been presented.

In addition to the cases cited, for instance, the cases of Commonwealth *v.* Trimmer, which I have just cited; Hilands *v.* Com., 114 Pa.; Com. *v.* Montross, 8 Sup.; Com. *v.* Zepp, 3 Clark (which is not a Supreme Court decision, however); Com. *v.* Hilands, 111 Pa., and also Altenburg *v.* Com., 126 Pa., we want to put upon record that under the ruling of the Supreme Court in this very case the Supreme Court shows that it is an absolute necessity that there should be an actual demand, without which there would be no crime. The failure to pay on demand, as contemplated, by the statute under which he is indicted, is a failure to pay that which, at the time the demand was made, belonged to the county making the demand. Then further on he says, "A demand there means an actual demand," and points out that a constructive demand, such as would arise from a judgment, which would be a demand in a civil court, would not be a sufficient demand in this case; and why? Because the act of Assembly, as we understand this ruling, renders that absolutely necessary—"or fail to pay over the same when thereunto legally required
97 by the state, county, or township treasurer, or other proper officer or person authorized to demand and receive the same," consequently this case stands in the position so far as this crime is concerned of having had no legal existence until the demand was made, or otherwise this language cannot be understood. Therefore we are led to the conclusion, based upon this very language and the language of that act of Assembly, that until a legal demand was made by a party who was authorized to make it and receive the money, the defendant was not called upon to pay over, and that is exactly what the Supreme Court says, and the crime was not completed. Consequently the crime that he is now called upon to answer for had no legal existence till after that demand was made. That is an additional reason why we cannot sustain the plea of former acquittal of the crime now charged in this indictment.

We want to assign another reason, speaking now, of course, of the three counts, four, eight and twelve, not of the other ten, and the position of this record to-day is this, that there is neither a conviction nor an acquittal. The Supreme Court have set that verdict aside, and therefore I fail to see where there is any record

showing a former conviction of any crime charged in these particular counts. It is wiped out as completely as though it never existed, and that, I think, is an additional reason why we cannot hold that this record which is presented to us shows a state of facts which bars a prosecution of the offense charged in the indictment now before us. Of course the clerk will note that the entire record is before the court, and also that under the pleadings it appears that the defendant is the same party named in the other indictment, so that everything that is necessary for him to raise hereafter, which should become necessary, will appear upon the record.

We therefore overrule the plea, sustain the demurrer, or give judgment for the county.

98 Defendant excepts. Bill sealed."

Sixth. The court erred on the general plea of *autrefois acquit*, in charging the jury and in directing a verdict for the Commonwealth, which charge and verdict are as follows, (See pp. 21, 22, 23, 24 and 25, Charge of the Court).

GENTLEMEN OF THE JURY:—

Before we instruct you on the question of guilt or innocence in this case, we think and believe after a most patient and careful investigation and careful reflection, that we are called upon in the discharge of our duty, to dispose of the question of former acquittal, that is, of the defendant's plea of former acquittal. In this very case the defendant by reason of the existence of a record in the Quarter Sessions against him in which he was previously tried, filed a plea setting up that he has heretofore been acquitted of the offense with which he is now charged, to this plea the Commonwealth filed a demurrer denying that the record was sufficient to establish such alleged fact. We believed and still believe that under these circumstances, it was our duty to examine the record of both the present case and the previous case, and anything that was before us in the shape of evidence on that plea, and determine whether or not it showed that this defendant had ever been acquitted of the offense of which he is now charged. We arrived at the conclusion that the offense named in the previous or first indictment and the offense named in this indictment, were two separate and distinct offenses, and we so stated and directed judgment to be entered in favor of the Commonwealth, after which you were selected as the judges between the Commonwealth of Pennsylvania and this defendant, and again the defendant offered in evidence the same record, having again set up as part of his plea that he had formerly been acquitted notwithstanding the fact that the record showed the judgment of the court on the evidence presented to the contrary. Possibly the

99 court would have been right if it had rejected the offering of this record, upon the ground that it had already been adjudicated in this very case, upon pleas that were competent and regular, but we felt if there was any other evidence in the possession of the defendant, which we could offer in addition to that record, that would tend to show that he had been heretofore tried for this crime, that he should have every opportunity possible to pre-

sent it and hence we allowed the record to be given in evidence, and permitted any evidence to be offered that the Defendant might have, tending to show that he had already suffered for this alleged offence, or that he had been acquitted whichever of the two positions he might see proper to take.

Now we have before us nothing excepting the very same record, the same indictment, same record; I do not know of any other testimony offered in this case that affects that record, excepting that which appears in the record, and comparison with the record in this case——

Mr. REILLY: I would call your Honor's attention to the fact that the commonwealth's own evidence shows in the statement of the defendant accompanying his return to the controller fi-ed in January 1903, offered by the commonwealth as evidence to show the moneys in the hands of the defendant, that they were the same identical moneys that were set out in the former indictment, and that was the reason that we did not offer any evidence.

The COURT: I take it that in part the money spoken of in the previous indictment and the present indictment refers to the same collections of license moneys or moneys for transfers; and it forms, possibly, a part of the money that is now mentioned in this indictment but anything that was before the court before contained in the indictment (and we had the record before us), does not change anything which is in the indictment now, so far as it names an amount and specifies for what purpose it was given. Now under these
100 papers I have presented to me the opinion of the Supreme Court right in this case between the commonwealth and this defendant when the previous indictment was before the Supreme Court. The Supreme Court there say that there was no right in the Controller, or the county, rather, to demand any money from this defendant before the civil suit had been decided, and at the time that that demand was made in December 1902, the civil suit was pending undetermined. Therefore it reversed the action of the previous trial, because no crime had been committed when he was tried. I have given that opinion the most careful consideration I am capable of giving, and I always cheerfully yield obedience to the instructions of our highest courts, for I believe that the liberties and rights of property and life depend upon the honest adherence to the rulings of the judicial branch of our government, and it is my ambition to properly understand their rulings and keep within them and carefully observe the same, without regard to consequences either way. Therefore, after much examination I am led to this conclusion, that when that opinion was filed in the Supreme Court of Pennsylvania, and subsequently here, and the proceedings of the previous trial were reversed, there was no crime that this defendant was called upon to answer for because the Supreme Court declared that the demand that had been made upon him was illegal, had no right to be made, and he was not bound to obey it, and therefore not bound to pay over the money when they called on him in December, 1902, because the county had no right to call on him then for this money, but they were bound to wait until after the Supreme Court as well as this

court, decided the question of whether or not he had any claim or right to that money. They did decide that subsequently, and they said in their decision that he had no right to any of the money; that it belonged to the county of Schuylkill, like the other fees of the office he held.

101 Now, gentlemen of the jury, under this state of facts, I come to the conclusion that there was no crime to try when he was tried before; that the crime that is now tried in this indictment exists only since the actual demand was made, which the language of that Supreme Court opinion requires to be made before he is required to pay over. Justice Brown says, "We may recognize a judgment as a constructive demand in a civil proceeding, but not so in a criminal case, where a party is called upon to pay over when legally thereunto required." That is the language of Justice Brown, and it is the language of that act of Assembly. For these reasons I am lead to the conclusion that the offence we are now trying is not the offence for which he claims to have heretofore been tried, and consequently that his plea of former acquittal cannot be sustained upon anything that is before us. Under these circumstances, and in view of what has already occurred in this case, to which I have refer-ed I esteem it as my duty to say to you that you should find in favor of the Commonwealth on the issue of former acquittal; in other words, I direct that to be your verdict, as being a proper and required discharge of duty upon my part, and the clerk having taken that verdict, I will then address you on the question of guilt or innocence, and whatever other questions are raised.

Mr. REILLY: I would like to call your Honor's attention to the fact that the record shows that this same evidence to which I referred, in the statement accompanying the return to the Controller, was offered in evidence on the former trial, and I now ask for an exception to your Honor's ruling, and that a bill be sealed before verdict.

The COURT: Certainly, we will grant you an exception. You will have every opportunity of questioning anything we may say or do in the matter, in the higher Court.

102 Before verdict, counsel for defendant excepted to the foregoing charge of the court, and requested that the same, together with the testimony in the case, be transcribed from the stenographer's notes and filed of record.

Granted. Bill sealed.

The jury then rendered the following verdict: "On the issue of former acquittal, we find in favor of the commonwealth."

103 *Petition for Supersedeas.*

In the Superior Court of Pennsylvania, Philadelphia District.

No. —.

COMMONWEALTH
vs.
JOHN T. SHOENER, Appellant.

An Appeal from the Court of Quarter Sessions of Schuylkill County, No. 905, September Term, 1905.

To the Honorable Charles L. Rice, Justice, and Justices of the Superior Court of Pennsylvania:

The petition of John T. Shoener, the above named defendant, respectfully represents: That your petitioner was elected as Clerk of the Court of Quarter Sessions of Schuylkill County at the general election held in 1899, for three years, and took upon himself the duties of said office and continued to act as Clerk of the Court of Quarter Sessions on and up to Monday, January 5th, 1903. That he filed a bond in the sum of Fifty Thousand Dollars with the Safe Deposit Bank of Pottsville as his surety—a bank that was then and now is one of the strongest of Schuylkill County's financial institutions. That under advice of counsel, the Five Dollars he received for liquor licenses from each applicant, he retained for judicial determination, inasmuch as the Act of July 30th, 1897, Section 3, page 470 reads: "Every person * * * shall, at the same time, pay said clerk Five Dollars for his expenses connected therewith; and said clerk shall cause to be published two times in three newspapers designated by him, one of which may be printed in the German language, a list containing the names of all such applicants, their respective residence, and the place for which application is made; and the cost of publication shall not exceed the usual
104 rates charged by such newspapers; the first publication shall not be less than fifteen nor more than twenty-five days before the time fixed by court; Provided, The amount to be paid for such advertisement shall not, in the aggregate, exceed the five dollars to be paid by such applicant for expenses." That he made his monthly returns to the Controller of the County of Schuylkill, accounting for all moneys received, and each and every return set forth the fact that the money received for licenses was held for judicial determination. That on November 20, 1901, the County of Schuylkill issued a summons in assumpsit against the said John T. Shoener for said license money. That on November 21, 1901, a case stated was filed. On December 22, 1902, on the case stated, the Court directed judgment for $5380, against your petitioner, and on December 24, 1902, filed an opinion. That on January 3, 1903, the Controller of Schuylkill County swore out a warrant charging embezzlement of these license funds. That on January 9th, 1903, a certiorari from

the Supreme Court was filed in the Court of Common Pleas in the said civil case. That on May 11th, 1903, the remittitur was returned and the opinion of Court filed, whereby the judgment of the lower Court was affirmed. That on November 14th, 1903, a bill of indictment containing thirteen counts was found against your petitioner, each of which charged embezzlement in one form or another, under the Act of March 31, 1860, relating to the embezzlement of public officers. That on January 4th, 1904, the case was called for trial, and that on January 8, 1904, the jury returned a verdict of guilty on the 4th, 8th and 12th counts, each of which counts contained the following language: "Did fail to pay over the same when thereunto required by the County of Schuylkill, or its legally authorized officer, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same." That on the same day there was a motion in
105 arrest of judgment and for a new trial filed. That on March 7th, 1904, the Court passed sentence. That on March 11, 1904, this Court made an order for a supersedeas, on the defendant entering bail. That this honorable Court then sustained the Court of Quarter Sessions, except to reverse it as to the form of sentence, and directed a *procedendo* to have the defendant, your petitioner, sentenced afresh in due order and according to law.

That then your petitioner petitioned to the Supreme Court to review the error of the Quarter Sessions and this Court, and on September 19, 1904, the appeal was allowed, to No. 286 January Term, 1904. That after due hearing, the Supreme Court rendered the following judgment: "The judgment of the Superior Court is reversed, as is that of the court below, and the defendant is discharged from his recognizance," June 22, 1905.

That — June 30, 1905, F. J. Noonan, County Treasurer, made a demand upon your petitioner to pay the county of Schuylkill the sum of $7243.28. That on August 3, 1905, A. J. Shortall, a representative of what is known as the Taxpayers' Association, swore out a warrant for his arrest for embezzlement, for the same funds he was tried for in January 1904, as to which the Supreme Court, by the judgment just quoted, directed that he be discharged from his recognizance—the indictment in the latter case being for the same funds, and practically in the same language as the fourth, eighth and twelfth counts of the former indictment, the difference being that the former indictment charged an aggregate in the three counts of over eighteen thousand dollars, there being a count for each of the three years he was in office, 1900, 1901, and 1902; while the latter indictment covers the three years aforesaid in one count. That the difference between over eighteen thousand dollars and the seven thousand dollars are credits and payments allowed your petitioner for the months of January, February and March, 1904.

That the former indictment alleged, on the question of
106 demand: "Did fail to pay over the same when thereunto required by the County of Schuylkill or its legally authorized officers, to the treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same." And

that the present indictment charged: "Which said sum F. J. Noonan, the said Treasurer did on the 30th day of June A. D. 1905 demand and require him the said John T. Shoener to pay over to him the said Treasurer, and the said John T. Shoener did unlawfully fail to pay over the same unto the aforesaid Treasurer when thereunto legally required, as aforesaid, by F. J. Noonan, Treasurer of the County of Schuylkill, he, the said F. J. Noonan, being the proper officer authorized to demand and receive the same."

Questions Involved.

That September 4, 1905, the case was called for trial. That a demurrer was filed, wherein, among other things, the statute of limitations was plead. That the District Attorney contended that the statute of limitations only started to run from the time the demand was made June 30, 1905, while your petitioner contended that the statute ran from the day your petitioner failed to pay over, January 5, 1903; May 11th, 1903 when the remittitur was filed in the civil case from the Supreme Court, where the Supreme Court decided that the license moneys out of which grew all this litigation, belong to the County. That the Court below sustained the Commonwealth in its contention that the statute of limitations only started to run from the time the demand was made, June 30, 1905.

That another important question raised was the plea of *autrefois acquit*. That your petitioner contended that as he was tried on a valid indictment for embezzling these same funds and had been acquitted by the verdict of the jury on ten of the thirteen counts in the former indictment and acquitted by the judgment of
107 the Supreme Court on the other three counts, viz: the fourth, eighth, and twelfth counts, and the same conversion and same moneys being involved, and the indictments charging exactly the same offence, that your petitioner's plea of *autrefois acquit*, once in jeopardy, is good.

That the same plea—*autrefois acquit*—was raised in the trial of the case before the jury. That the court directed a verdict of the jury against your petitioner on his plea of *autrefois acquit*. That your petitioner contended that it was also within the province of the jury to pass upon the question of whether or not he had stood trial upon the same charge.

That there was a motion made in arrest of judgment and for a new trial, and reasons filed. That the court, in its opinion, has overruled the motion in arrest of judgment and for a new trial. That your petitioner, pending the trial, and up until the judgment of this Court, is under Five Thousand Dollars bail. That the Court this day, Monday, October 23, 1905, passed the following sentence upon your petitioners:

"Now, to wit, Oct. 23, 1905, sentence of the Court, that the defendant pay a fine $7243.28, the sum embezzled, and that he undergo punishment in the Schuylkill County Prison by separate or

solitary confinement for and during the term of two years and six months, to commence and be computed from this date."

That in order that all matters may be before your Honors, as to the questions raised, there is attached hereto a copy of the plea of *autrefois acquit* filed with the Court, which includes the former indictment, the indictment in this case, the demurrer, wherein the statute of limitations is raised, the reasons for a new trial, and the opinion of the Court in refusing to grant a new trial or arrest judgment

Therefore your petitioner avers that the Court below has
108 erred in not sustaining the plea of *autrefois acquit,* and not sustaining the plea of statute of limitations, and prays your honorable Court to be permitted to have his case heard and reviewed by your honorable Court upon the questions raised, and that an order of supersedeas be made; and he will ever pray.

JNO. T. SHOENER.

SCHUYLKILL COUNTY, *ss:*

John T. Shoener, being duly sworn according to law doth depose and say that the facts set forth in the foregoing petition are true and correct to the best of his knowledge and belief.

ISAAC BALL,
Clerk Sess. [SEAL.]

Endorsement:—211 October Term, 1905—Commonwealth *vs.* John T. Shoener, Appellant—Petition for supersedeas—Filed Oct. 23, 1905, in the Superior Court—Wm. Wilhelm.

109 In the Superior Court of Pennsylvania, Sitting at Philadelphia, October Term, 1905.

No. 211.

COMMONWEALTH
v.
JOHN T. SHOENER, Appellant.

Appeal from the Court of Quarter Sessions for the County of Schuylkill. No. 905, September Term, 1905.

In re Petition for Supersedeas.

Now October, 23, 1905, it is ordered that the appeal taken in this cause shall operate as a supersedeas upon the defendant giving bail with one or more sufficient sureties in the sum of six thousand dollars; bail to be taken and approved before the Court of Quarter Sessions of Schuylkill or a Judge thereof upon due notice to the District Attorney of the time and place of taking the same.

By the Court.

CHARLES E. RICE.
President Judge.

True copy from the Record.

In testimony whereof I have hereunto set my hand and the seal of said Court, at Philadelphia this twenty-third day of October, 1905.

[SEAL.] LEWIS C. GREENE,
Deputy Prothonotary.

Endorsement: No. 211—October Term, 1905—Superior Court—Commonwealth *vs.* John T. Shoener, Appellant—Appeal to operate as a supersedeas, on entry of bail, in the sum of *sum* thousand dollars, etc., etc.

By the Court.

CHARLES E. RICE,
President Judge.

110 *Opinion of the Court.*

In the Superior Court of Pennsylvania.

No. 211, October Term, 1905.

COMMONWEALTH OF PENNSYLVANIA
v.
JOHN T. SHOENER.

Appeal from Court of Quarter Sessions of Schuylkill County.

Filed March 12, 1906.

PORTER, *J.:*

The first specification alleges that the court below erred "in overruling the third paragraph of defendant's demurrer, which paragraph is as follows": "That the offense charged in said indictment is barred by the statute of limitations, the same having been found more than two years after the moneys alleged to have been received by the defendant and which he failed to pay over, came into his hands." The indictment charged in apt language that the defendant had been duly elected and qualified as clerk of the court of quarter sessions of the peace for the county of Schuylkill, and exercised the duties, powers, rights and privileges of said office from the first Monday of January 1900 until the 5th of January 1903; and that he had by virtue of his office collected and received from applicants for license to sell liquor in said county fees amounting to the sum of seven thousand, two hundred and forty-three dollars and twenty eight cents, and upwards; for and in the name of and on account of the county of Schuylkill, for safe-keeping and transfer to the treasurer of the said county of Schuylkill; and that F. J. Noonan, the treasurer of said county of Schuylkill did on the 30th day of June A. D. 1905, demand and require him, the said John T. Shoener to pay over to him, the said treasurer, the said sum of money and the said John T. Shoener did unlawfully fail to pay over the said sum unto the said treasurer when thereunto lawfully required, by said

treasurer he the said F. J. Noonan being the proper officer authorized to demand and receive the same.

111 The indictment was drawn under the provisions of the 65th section of the act of March 31st, 1860, P. L. 400, which provides that; "If any state, county, township or municipal officer * * * shall convert to his own use, in any way whatsoever, or shall use, by way of investment in any kind of property or merchandise any portion of the public money entrusted to him for collection, safekeeping, transfer or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the state, county or township treasurer, or other officer or person authorized to demand and receive the same, every such act shall be deemed and adjudged to be an embezzlement of so much of said money as shall be thus taken, converted, invested, used or unaccounted for, which is hereby declared a misdemeanor." The present Chief Justice construed this section of the statute in Commonwealth *v.* Mentzer, 162 646, and there said; "The section clearly specifies four distinct and separate acts with reference to public money, which shall constitute the offense of embezzlement, to-wit, conversion to the officer's own use, investmnet in property or merchandise, becoming a defaulter, or failing to pay over on proper demand. These are clearly enumerated in the disjunctive, and it is further declared that 'every such act' shall be deemed and adjudged an embezzlement. Each of these acts therefore, though of very varying character and degree of moral turpitude, is of equal legal import, and by itself constitutes the full statutory offense. *Prima facie* therefore, each of such acts charged is a separate crime, and where such is the fact no two can be charged in the same count. But * * * where * * * two or more of the enumerated acts are in truth only successive steps in one appropriation or embezzlement of the same money, it would be contrary to the fundamental principles of our criminal jurisprudence to hold that they had not merged and become but one offense." This indictment charged the defendant with only one of the acts by the statute made a misdemeanor; the failure to pay over the money when thereunto legally required by the

112 county treasurer, the proper officer authorized to demand and receive the same. This statute did not make it a misdemeanor for a county officer to fail to pay over public money as soon as he received it, nor as soon as it became his official duty to pay it over, under its provisions it is only after the officer who has collected the money has been legally required to pay by the county treasurer or other proper officer or person authorized to demand and receive the same, that a failure to make the payment becomes a misdemeanor. That a demand must be made before this offense can be committed; that the demand must be an actual one, and that no constructive demand will meet the requirements of this statute has been definitely settled by the decision of the Supreme Court in Commonwealth *v.* Shoener, 212 Pa. 527. This indictment averred that the demand by the treasurer was made on June 30th, 1905. If the other averments of the indictment were true the defendant was still civilly liable to the county for the money, and the treasurer had the lawful right to

make the demand, had the defendant then paid the money he would never, so far as the averments of this indictment are concerned, been guilty of the offense with which he is now charged. It was only his failure to pay when the demand was made upon him that brought him within the operation of this statute, the right of the Commonwealth to prosecute then arose, and from the date of the demand the statute of limitations began to run. The first specification of error is dismissed.

The defendant raised in various forms the question as to when the statute of limitations, as to this offense, began to run, by his first, second, third and fourth written requests for instructions to the jury. These points presented but one question in different forms, and by them the court was requested to instruct the jury; that the act of March 31st, 1876, P. L. 13 made it the official duty of the defendant to pay into the county treasury on the first Monday of each
113 month during his term and the first Monday of the month next after the expiration of his term all fees received by him during the *proceeding* month, and that the defendant was required by law to pay the $7243.28 mentioned in the indictment into the county treasury on the first Monday of January 1903, and if the jury found that he had failed to do so, "the offense of failure to pay over under this indictment was then complete," and it immediately became the duty of the county treasurer to demand payment of said money, and the Commonwealth was bound to bring the indictment within two years from the time when the county treasurer could have so legally demanded payment of said money; that the failure of the treasurer to make the demand could not stop the running of the statute of limitations, and that the indictment not having been found within two years the verdict must be not guilty. The fourth point added "That any agreement or stipulation entered into between the County of Schuylkill and the defendant for the purpose of legally determining the legal ownership of said money or any part thereof in a civil proceeding in the courts of the state did not arrest the running of the statute in favor of the defendant, but the statute became a bar to this indictment in two years after the first Monday of January 1903, when defendant's term of office expired and he failed to pay over." The defendant was not indicted under the provisions of the act of 1876. It cannot be seriously contended that the act of 1876 repealed the 65th section of the act of March 31st, 1860. The third section of the act first mentioned does it is true provide penalties for violation of some of its provisions, but it expressly provides that such penalties shall be "in addition to the other penalties for such offenses". We must, for the reason so clearly stated by Mr. Justice Brown in Commonwealth *v.* Shoener, 212 Pa. 531, hold that in order to complete and render liable to indictment the crime with which this defendant stands charged, there must be an actual demand made upon him by a proper officer, and "a failure to pay that
114 which, at the time the demand is made, clearly belongs to the county making the demand". The offense had no existence until after a lawful demand, within the meaning of the statute, was made, and from the date of that demand the statute of limita-

tions began to run. Had the defendant produced evidence that some officer having authority to do so had, at a time when the defendant was legally liable to have such demand made upon him, actually demanded that the defendant pay the money to the county treasurer, that evidence would have raised a question of fact as to the time when the first regular and lawful demand was made and the statute of limitations would begin to run from that date. No such evidence was offered. The question attempted to be raised by the fourth point was not involved in this case; the agreement referred to did not arrest the running of the statute of limitations after it had once commenced to run, but that agreement having been made before the defendant had received the money involved in this proceeding, he had the right from the moment he received it to hold it until the question of the ownership of the fees was determined by the final judgment of the Supreme Court, and it was not until after that final judicial determination that the county treasurer had any right to demand payment of the money. This was expressly ruled in Commonwealth *v.* Shoener, 212 Pa. 527.

The fifth and sixth specifications of error may be properly considered together. The defendant interposed a special plea in bar, setting forth at length the record of the proceedings in the case of the Commonwealth *v.* John T. Shoener, No. 75 March Term 1903 of the Court of Quarter Sessions of the County of Schuylkill, and the review thereof by the Supreme Court of Pennsylvania on appeal to No. 286 January Term 1904, reported 212 Pa. 527, and upon the record so pleaded prayed judgment of the court if he ought to be put further to answer the present indictment. The Commonwealth demurred to the plea, and the Court sustained the demurrer,
115 which ruling is the subject of the fifth specification of error. The defendant then entered a general plea of *autrefois acquit* and not guilty. The only evidence offered under the plea of *autrefois acquit* was the same record which had been specially pleaded in bar, there being no dispute that the defendant was the person charged in the former indictment; and upon that issue the jury, under the instructions of the court, rendered a verdict in favor of the Commonwealth. The instruction of the court in directing the jury to find for the Commonwealth on that issue is the subject of the sixth specification of error. On demurrer to a plea in bar the court will consider the whole record, and give judgment for the party who, on the whole appears to be entitled thereto. If the plea is former acquittal, the question whether the former acquittal was for the same offense depends upon the record pleaded, and not on the arguments or inferences deduced therefrom; Murphy *v.* Richards, 5 W. & S. 279; Heikes *v.* Commonwealth, 26 Pa. 513. The record pleaded in bar showed a prosecution for embezzlement commenced on January 3d, 1903, an indictment found on November 14th, 1903, containing thirteen counts, a trial which resulted in the acquittal of the defendant on the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh and thirteenth counts, and a verdict of guilty on the fourth, eighth and twelfth counts, a judgment of the Court of Quarter Sessions upon the eighth and twelfth counts and a reversal of that judgment,

and discharge of the defendant from his recognizance by the Supreme Court. Upon the trial of the issue formed by the record pleaded in bar the burden was upon the Commonwealth to prove that prior to the commencement of that prosecution a proper officer had made demand upon the defendant that he pay to the county treasurer money which, at the time the demand was made, it was the legal duty of the defendant to so pay, and that the defendant had failed to pay upon such demand. No evidence of a demand made after the finding of that former indictment would, upon the trial thereof, have been admissible. In the present indictment it
116 was necessary for the Commonwealth to prove that there had been a demand made by the county treasurer on June 30th, 1905, that the defendant pay, to said treasurer, money belonging to the county at that time in the hands of the defendant and which the treasurer at that time had the lawful right to require him to pay. The true test to ascertain whether the plea of *autrefois acquit* be a good bar is whether the evidence necessary to support the second indictment would have been sufficient to secure a legal conviction on the first; Commonwealth *v.* Tadrick, 1 Pa. Superior Ct. 555; Commonwealth *v.* Rockfeller, 3 Pa. Superior Ct. 588; Commonwealth *v.* Montross, 8 Pa. Superior Ct. 237; Commonwealth *v.* Hazlett, 14 Pa. Superior Ct. 352 and 16 Pa. Superior Ct. 534; Hilands *v.* Commonwealth, 114 Pa. 372. The plea averred the offenses to have been the same, but the effect of this was to change the record, and the record must stand; Commonwealth *v.* Trimmer, 84 Pa. 65. There was no error in the judgment of the court upon the demurrer to the special plea in bar. The instruction of the court to the jury to find for the commonwealth upon the issue raised by the defendant's plea of *autrefois acquit* might be sustained upon the same grounds alone, but as the facts, although absolutely undisputed, are somewhat involved it may be well to briefly state them. The defendant offered in evidence the record of the indictment and proceedings thereunder against him above referred to, and in immediate connection therewith the record of the case of the County of Schuylkill *v.* John T. Shoener, No. 61 January Term 1902 of the Court of Common Pleas of Schuylkill County; No. 6 January Term 1903 of the Supreme Court of Pennsylvania, and especially the agreement in the nature of a case stated between the County and Shoener, included in the latter record. These two records, taken together, establish all facts considered by the Supreme Court in Commonwealth *v.* Shoener, 212 Pa. 527.

The verdict of the jury at the former trial found the defendant not guilty upon ten *cents* of the indictment and guilty upon
117 three counts. The verdict as to the counts upon which the defendant was acquitted established that he had not prior to that time converted the money to his own use, or invested it in property or merchandise. These are offenses distinct from the mere failure to pay over on proper demand, and the acquittal as to them would not shield the defendant against the present prosecution; Commonwealth *v.* Mentzer, *supra*. The three counts upon which the defendant was found guilty were the fourth, eighth and twelfth,

The fourth count charged him with failure to pay over upon demand the moneys received by him as license fees on January 7th, 1901; the eighth count charged a like offense with regard to moneys received on the 6th day of January 1902, and the twelfth count charged him with a failure to pay on demand moneys received by him on the 5th day of January 1903; the failure to pay over on demand the money received by the defendant for license fees in the month of December in each year of his term, as shown by his report filed on the first Monday of January following, being laid in a separate count. The Court of Quarter Sessions did not sentence the defendant upon the fourth count of the indictment, which charged the failure to pay over the fees received in January 1901. The court did sentence the defendant on the eighth and twelfth counts, which respectively charged the failure to pay over on demand the fees included in his official reports for January 1902 and January 1903. That judgment was reversed by the Supreme Court, without a new venire; Commonwealth *v.* Shoener, 212 Pa. 527; for the reason that because of the then pending civil proceeding and the agreement in the case stated to which the county and the defendant were parties the defendant had the right to retain all these license fees; that they did not become payable to the county and neither the county nor any of its officers had a right to demand that the defendant should pay them to the county treasurer, until after the question of the ownership of the fees had been determined by the Supreme
118 Court which final determination was not had until May 4th, 1903, in the decision reported in Schuylkill County *v.* Shoener, 205 Pa. 592. In reversing the judgment of this court and of the Court of Quarter Sessions the Supreme Court, who spoke by Mr. Justice Brown, in reference to the failure of the defendant to pay said; "In refusing to comply with the notice to pay he was standing on his right not to do so until it was determined that the county was entitled to receive the money."

The record offered in evidence did not show an adjudication that the defendant had not received the money, nor that having received it he had paid it over. It did show an adjudication by the court of last resort that the defendant had the right to retain this money and could not legally be required to pay it over until the 4th day of May 1903. The agreement in the nature of a case stated, which was thus conclusively determined to vest in the defendant the right to retain these fees until the question of their ownership was determined by the Supreme Court, was made, executed and filed of record in the Court of Common Pleas of Schuylkill County of November 21st, 1901. The fees involved in the present indictment were not received by the defendant until after that date, a part of them within two months and that remaining portion over a year after the agreement had been filed of record. The agreement was in force at the time the defendant received the fees. There never was a time when a lawful demand could have been made upon the defendant to pay these fees, until after the question of their ownership was determined by the Supreme Court on May 4th, 1903. This was distinctly held with regard to the twelfth count of the in-

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dictment in the former proceedings, which distinctly charged the receipt of the fees to have been in January 1903, and which was supported by evidence that the money was actually received by the defendant in December 1902, and that he acknowledged said receipt in his official return on the first Monday of January 1903.

119 The defendant had received the money in question by virtue of his office, when the question of its ownership was determined by the decision of the Supreme Court on May 4th, 1903 it became his duty to pay the money to the county treasurer, but his failure to pay it did not, under the provisions of the 65th section of the act of March 31st, 1860, become criminal until after the county treasurer had made demand. When the treasurer did make such demand, the offense was complete. The instruction of the court below to the jury to render a verdict in favor of the Commonwealth upon the issue raised by the plea of *autrefois acquit* was, under the records and evidence presented, correct; Solliday *v.* Commonwealth, 28 Pa. 13, and the cases hereinbefore cited. In this view of the case we do not deem it necessary to consider the question of the constitutionality of the act of June 12th, 1878, P. L. 196 section 6, nor whether the period of limitation of prosecutions in cases of this character is by that statute extended to four years. All the assignments of error are dismissed.

The judgment is affirmed, and it is ordered that the defendant appear in the Court of Quarter Sessions of Schuylkill County and by that court be committed until such part of the sentence as had not been performed when this appeal was made a supersedeas, be complied with.

STATE OF PENNSYLVANIA, *Philadelphia:*

I, Lewis C. Greene, Deputy Prothonotary of the Superior Court of Pennsylvania, do hereby certify that the above and foregoing is a true copy of the opinion in the above entitled cause, so full and entire as appears of record in said court.

In testimony whereof I hereunto set my hand and affix*ed* the seal of said court at Philadelphia this 14th day of March A. D. 1906.

LEWIS C. GREENE,
Deputy Prothonotary.

120 *Writ of Certiorari.*

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

The Commonwealth of Pennsylvania to the Justices of the Court of Quarter Sessions for the county of Schuylkill, Greeting:

We being willing for certain causes, to be certified of the matter of the Appeal of John T. Shoener from the Judgment and sentence in No. 905 September Term, 1905, wherein Commonwealth was plaintiff, and the said appeallant was defendant, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices

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of our Superior Court of Pennsylvania, at a Superior Court to be holden in Philadelphia, the First Monday of December next, so full and entire as in our Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Charles E. Rice, Doctor of Laws, President Judge of our said Superior Court at Philadelphia, the twenty-third day of October in the year of our Lord one thousand nine hundred and five.

LEWIS C. GREENE,
Deputy Prothonotary.

To the Honorable the judges of the Superior Court of the Commonwealth of Pennsylvania, *sitting* at Philadelphia:—

The Record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

O. P. BECHTEL, *P. J.* [L. S.]
A. L. SHAY, *J. of C. P.* [L. S.]

121 I certify that D. R. Schall, John S. Zulick, George R. Linder are surety in the within case, in the sum of Five Thousand Dollars.

ISAAC BALL,
Clerk of Quarter Sessions Court.

Endorsement: 905 September Term, 1905, Q. S. Schuylkill Co.—No. 211 October Term, 1905.—Superior Court—Commonwealth *vs.* John T. Shoener, Appellant—Certiorari to the Court of Quarter Sessions for the County of Schuylkill. Returnable the First Monday of December, 1905. Rule on the Appellee, to appear and plead on the Return-day of the Writ.—Filed Dec. 4, 1905, in the Supreme Court—William Wilhelm.

122 *Petition for Order of Release from Schuylkill County Prison, Pending Motion for Reargument.*

In the Supreme Court of Pennsylvania, Eastern District.

No. 131, January Term, 1906.

COMMONWEALTH OF PENNSYLVANIA
v.
JOHN T. SCHOENER, Appellant.

STATE OF PENNSYLVANIA, *County of Schuylkill:*

Personally appeared before me John T. Schoener, the above named appellant, who after being duly sworn according to law does depose and say that he is now in the Schuylkill county prison; that

on Thursday, July 5th, 1906, at the suggestion of his counsel William Wilhelm, he called to see the district attorney, and reported to the district attorney that steps were being taken for a further hearing in the above case; that he and his counsel would apprise the district attorney of the result of the efforts for a further hearing; that the district attorney called him up over the telephone on Friday, July 6th, 1906, and notified him that word had come from a higher source that it was advisable for him to go to prison either Friday night, or at the latest, Saturday morning July 7th, 1906, to serve out his sentence; that at that time he could not get into communication with his counsel, as he was then away making an effort to get a further hearing in his case; that he complied with the suggestion of the District Attorney, in order that his bail might not be put to any trouble or any further costs made, and went to jail; that he has always had a good bond; and that the bond has been for his
123 appearance when wanted, a copy of which bond is hereto attached to this affidavit. JOHN T. SCHOENER.

Sworn and subscribed before me this 10th day of July A. D. 1906.
[SEAL.] ISAAC BALL,
Clerk Sessions.

124 In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

Sur Charge of September Sessions, 1905, No. 905.

THE COMMONWEALTH OF PENNSYLVANIA
v.
JOHN T. SHOENER.

We, and each of us do acknowledge ourselves jointly and severally indebted to the Commonwealth of Pennsylvania, in the sum of Five Thousand Dollars, to be levied of our and each of our goods and chattels, lands and tenements: Upon this condition, that if John T. Shoener the defendant in the above entitled case, shall be and appear **at the next Court of Oyer and Terminer and Quarter Sessions of** the Peace, to be holden at Pottsville, in and for the County of Schuylkill, on the — when *and* wanted 190–, then and there to answer all such charges as may be preferred against the said defendant, **and that he shall abide and not depart from the Court without leave;** then this recognizance to be void and of no effect, otherwise to be and remain in full force and virtue.

JNO. T. SHOENER. [SEAL.]
D. R. SCHALL. [SEAL.]
JNO. S. ZULICK. [SEAL.]
GEO. R. LINDER.

Taken and acknowledged before me in open court, this 6th day of Sept. A. D. 1905.

ISAAC BALL,
Clerk of Sessions.

Witness:
[SEAL.] JAMES WALTON.

And now I, the defendant being duly called and not
125 answering, and the Bail- being duly called on to bring forth the body of the said defendant and failing to do so, this recognizance is decreed and adjudged to be forfeited.

I do Certify that the within is a true and correct copy as the same appears of Record in the office of the Clerk of Quarter Session Court.

ISAAC BALL,
Clerk of Courts.

Endorsement: No. 905 Recognizance September Sessions, 1905 Commonwealth *vs.* John T. Shoener For appearance of Defendant at — When Wanted Sessions, 1

And now, July 11th, 1906, it appearing that the defendant, John T. Shoener, at the suggestion of the district attorney of Schuylkill county, presented himself to the prison officials of the Schuylkill county jail on Friday, July 6th, 1906, to serve out his sentence, pronounced in the Quarter Sessions case of No. 905 September Term, 1905, and there is now pending a petition for a re-argument, and that his bail entered in pursuance of the Supersedeas from the Superior Court is for the appearance of defendant when wanted, it is ordered and directed that the defendant be released from the Schuylkill county jail, pending the disposition of his petition for a re-argument, subject nevertheless, to further order of this Court.

Per Curiam.

MITCHELL,
Chief Justice.

126 Endorsement: 131 January Term, 1906 Commonwealth of Pennsylvania *v.* John T. Shoener, Appellant Petition for an order for release from Schuylkill County Prison Wm. Wilhelm, Attorney at Law Pottsville, Pa. and order of Chief Justice Mitchell, of the Supreme Court of Pennsylvania releasing appellant on Entry of Bail in $5000.

127 In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill, State of Pennsylvania.

[SEAL.] Among the records and proceedings of said Court to September Sessions 1905 *inter alia* it is thus contained.

No. 905 September Sessions, 1905.
Tried before Judge Bechtel, No. 2 Court Room.
Date of return August 31st, 1905, Justice J. H. Fister.
Amount of Bail $5000—August 31st, 1905.
Sureties defendant and George R. Linder, David R. Schall, John S. Zulick.
Delivered to District Attorney August 31st, 1905.

COMMONWEALTH
v.
JOHN T. SHOENER.

Charge: Receiving money as Clerk of Quarter Sessions Court, and failing to pay same to County Treasurer. On information and oath of A. J. Shortall, September Sessions, 1905.
A True Bill.

H. S. ALBRIGHT,
Foreman Grand Jury.

Demurrer filed September 6th, 1905. Replication to demurrer filed September 6th, 1905. Plea *autrefois acquit* filed September 7, 1905, September 7th, 1905. Defendant being arraigned pleads "Not guilty;" same day a jury being called the following persons came to wit: John Minnich, Thomas Evans, T. F. Murphy, John J. Brady, A. E. Granzow, John Rosser, William Fox, Frederick Sanner, Joseph Frank, Albert Schapple, S. L. Price, Christian Foltz, twelve free honest and lawful men, who being all duly called, sworn and charged, do say September 8th, 1905, that they find the defendant John T. Shoener, "Guilty" in manner and form as indicted. September 8th, 1905. Motion in arrest of judgment filed, reasons for a new trial filed September 11th, 1905. Testimony filed.
128 September 28, 1905. Charge of court filed October 2d, 1905. Rule for a new trial discharged and opinion of court filed, October 16th, 1905.

October 23d, 1905, the court sentenced the defendant John T. Shoener, to pay a fine of $7243.28 equal to the amount embezzled to the Commonwealth, that he pay the costs of prosecution, and that he undergo punishment in the Schuylkill County Prison, for and during the term of two (2) years and six (6) months to commence and be computed from this date, and shall therein be kept and fed, clothed, treated and governed as provided by law, and stand committed until the sentence of the court be complied with.
By the Court.

ISAAC BALL,
Clerk Sessions.

129 COMMONWEALTH OF PENNSYLVANIA,
County of Schuylkill, ss:

[SEAL.] I, Isaac Ball, Clerk of the Court of Quarter Sessions of the Peace, in and for said county, do hereby certify that the foregoing writing is a full, true and correct copy of the Quarter Sessions Docket of the case therein stated, wherein Commonwealth of Pennsylvania is plaintiff, and John T. Shoener, defendant, as the same remains of record and on file in said court. In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Pottsville, this 2nd day of December, A. D. 1905.

ISAAC BALL,
Clerk of Courts.

COMMONWEALTH OF PENNSYLVANIA,
County of Schuylkill, ss:

I, Isaac Ball, Clerk of the Court of Quarter Sessions of the Peace in and for said county, do hereby certify that the notes of testimony herein found in this record, the charge of the court in overruling the motion filed for a new trial are full and complete as they appear of record, and are as they were when directed to be filed in this case by O. P. Bechtel, Prest. Judge.

ISAAC BALL,
Clerk Sess.

130 SCHUYLKILL COUNTY, *ss:*

A. J. Shortall being duly sworn according to law doth depose and say that John T. Shoener, prior to the first day of January, 1903, was the duly elected, qualified and acting clerk of the Courts of Quarter Sessions of the Peace in and for the County of Schuylkill, and as such officer was charged with the collection, safe keeping and transfer of moneys paid for and in connection with the granting of liquor licenses by the said court in said county, and received into his hands as such officer the sum of seven thousand two hundred and forty-three dollars and twenty-eight cents ($7243.28) of such moneys, which money it was his duty to pay over to the Treasurer of said County; that on or about the 30th day of June 1905, F. J. Noonan, the duly elected, qualified and acting Treasurer of said County, and authorized to demand and receive the said money, demanded and required the said John T. Shoener to pay over to him as Treasurer of said county the said sum of seven thousand two hundred and forty three dollars and twenty-eight cents ($7243.28), and the said John T. Shoener has neglected, refused and failed to pay over the same or any part thereof, and further deponent saith not.

(Signed) A. J. SHORTALL.

Sworn and subscribed to before me this 30th day of August, A. D. 1905.

J. H. FISTER, *J. P.*

131 Bail Piece.

Charge: receiving as clerk of Q. Sessions of Schuylkill Co., Pa. $7243.28 and failing to pay over to County Treas. On Oath of A. J. Shortall before J. H. Fister one of the Justices of the Peace in and for the County of Schuylkill, Pa.

SCHUYLKILL COUNTY, *ss.*,
v.
JOHN T. SHOENER.

I do certify that George R. Linden and David R. Schall and John S. Zulick of the said county of Schuylkill became bail for this

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lant in the above stated action or prosecution for the sum of
housand dollars for the appearance of said John T. Shoener
next Court of General Quarter Sessions of the Peace, to be
t Pottsville, Pa., in and for the County of Schuylkill to an-
uch things as shall be objected against him in this case by
izance taken before me, the said Justice of the Peace on the
lay of August, A. D. 1905, as appears by the record of the said
izance remaining in my office.
ness my hand and seal at Orwigsburgh, Schuylkill County
0th day of August, 1905.

H. H. BROWNMULLER, *J. P.* [SEAL.]

n. Expired May 1, 1906.

Recognizance.

THE COMMONWEALTH OF PENNSYLVANIA
v.
JOHN T. SHOENER.

rrant issued 30th of August, 1905, on oath of A. J. Shortall,
ng defendant with receiving as clerk of Quarter Sessions Court
uylkill County the sum of $7243.28 and failing to pay the
o the County Treasurer after demand made.

Costs:

I. Fister:

.....	.50
nt	.50
t Ent.	.25
. Pros.	.50
cript	.50
	2.25

ice J. A. Zimmerman.

gust 30, 1905, defendant arrested and waived hearing, and
d into recognizance before H. H. Brownmiller, Esq., for his
rance at the next Court of General Quarter Sessions of the Peace
swer John T. Shoener, George R. Linden, David R. Schall,
S. Zulick, sureties. Each bound in the sum of $5000.00 con-
ed for the appearance of defendant at the next Court of Gen-
uarter Sessions of the Peace of Schuylkill County, &c., and not
art without leave, &c., A. J. Shortall, Each bound in the sum
) for his or her appearance at the next Court of General Quar-
ssions of the Peace of Schuylkill County, to testify, &c.
tsville, Aug. 31st, 1905, acknowledged before me.

J. H. FISTER, *J. P.* [SEAL.]

tice of the Peace Commission expires first Monday in May,

CENTER

Endorsement: No. 905, Sept. Sessions, 1905—Recognizance—Commonwealth *v.* John T. Shoener—For receiving as clerk of Quarter Sessions Court of Schuylkill County $7243.28 and failed to pay the same to Treas.—Filed and entered Aug. 31, 1905, Isaac Ball, Clerk Sess.

133 In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill, September Sessions, 1905.

SCHUYLKILL COUNTY, *ss:*

The grand inquest of the Commonwealth of Pennsylvania, inquiring for the body of the County of Schuylkill, upon their respective oaths and affirmations, do present and say that John T. Shoener, late of the said county, yeoman, heretofore to wit, at the general election, held by the qualified electors of Schuylkill County on the seventh day of November, A. D. 1899, was duly elected Clerk of the Court of Quarter Sessions of the county of Schuylkill, to serve as such for the then next ensuing term, commencing on the first Monday of January, 1900, and continuing thereafter for a period of three years.

That the said John T. Shoener, aforesaid, did accept the said election, and did file his bond and take the oath of office required by law and did on the first Monday of January, 1900, enter upon the duties of the said office as Clerk of the Court of Quarter Sessions of the Peace for the County of Schuylkill, a county then and now containing upwards of one hundred and fifty thousand in population, and continued in said office and exercised the duties, powers rights and privileges of said office in and for the county of Schuylkill until January fifth, 1903.

That the said John T. Shoener, as Clerk of the Court of Quarter Sessions, aforesaid, was by law authorized and required to collect and receive from each applicant for a liquor license in said county, and from each applicant for a transfer of a liquor license previously granted the sum of five dollars and was legally required on

134 the first Monday of each and every month to pay to the Treasurer of the County of Schuylkill all fees so received from the preceding month, taking duplicate receipts therefor which receipts he was required to deposit with the County Controller, together with a transcript in detail of his fee and account book for the preceding month under oath, showing a true and correct list of all such fees received as aforesaid.

The grand inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, during the years 1900, 1901 and 1902, at the County of Schuylkill and within the jurisdiction of this court, with force and arms, &c., being then and there the duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the County of Schuylkill aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications and fees on applications for the transfer of liquor license, did by virtue

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of his said office of clerk of the Court of Quarter Sessions for the County of Schuylkill, aforesaid, then and there whilst acting and holding said office as Clerk of the Court of Quarter Sessions of the County of Schuylkill, receive, collect and take into his possession certain moneys for fees as aforesaid, to a large amount, to wit, seven thousand two hundred and forty three dollars and twenty-eight cents, and upwards, lawful money of the United States for and in the name of and on account of the County of Schuylkill, and having so collected, received, and taken into his possession for safe keeping and transfer to the Treasurer of the said county of Schuylkill the said sum of seven thousand two hundred and forty-three dollars and twenty-eight cents and upwards, which said sum F. J. Noonan, the said Treasurer did on the 30th day of June, A. D. 1905,
135 den and and require him the said John T. Shoener to pay over to him the said Treasurer, and the said John T. Shoener did unlawfully fail to pay over the same unto the aforesaid Treasurer when thereunto legally required, as aforesaid, by F. J. Noonan, Treasurer of the County of Schuylkill, he the said F. J. Noonan being the proper officer authorized to demand and receive the same, contrary to the act of General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

C. E. BERGER,
District Attorney.

Endorsement: No. 905, September Term, 1905, Commonwealth of Pennsylvania *v.* John T. Shoener, Embezzlement, September 4, 1905, A true bill. H. S. Albright, Foreman. The defendant being arraigned pleads — District Attorney.

136 In the Court of Quarter Sessions of the Peace in and for Schuylkill County.

No. 905, September Term, 1905.

COMMONWEALTH
v.
JOHN T. SHOENER.

Embezzlement.

And now September 7, A. D. 1905 the defendant pleads to the above indictment *autrefois acquit*, and avers that he has heretofore been lawfully acquitted of the same offence charged in the above indictment, and for further plea the defendant pleads the statute of limitations and not guilty.

JOHN T. SHOENER.

Sept. 5, 1905 the defendant being called to plead, pleads as above stated.

C. E. BERGER,
District Attorney.

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Endorsement: No. 905 Sept. T. 1905, Comm'th *v.* John T. Shoener, Defendant's Pleas. Filed Apr. 7, 1905 Isaac Ball Clerk Sess. We find the defendant John T. Shoener guilty in manner and form as indicted. T. J. Murphy, Foreman.

137 In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

No. —, Sept. Term, 1905.

COMM'TH, &c.,
v.
JOHN T. SHOENER.

The defendant, not confessing or acknowledging all, or any of the matters and things in the said indictment alleged to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto and for cause of demurrer, doth say:

First. That said indictment is defective and insufficient in law, it appears on its face that the said defendant was not a county officer at the time the alleged demand was made upon him to pay over the moneys mentioned in said indictment, and the 65th section of the act of 31st March 1860, upon which said indictment is based, does not apply.

Second. That said indictment is defective and insufficient in law, in that it contains in the same count, three separate and distinct alleged offenses in that he received and failed to pay over certain moneys at three different times, to wit in the years 1900, 1901, 1902.

Third. That the offense charged in said indictment is barred by the statute of limitations, the same having been found more than two years after the moneys alleged to have been received by the defendant and which he failed to pay over, came into his hands.

Fourth. That said indictment is defective and insufficient because it is vague and indefinite in that it does not allege or specify what amounts of money were collected or received by defendant for each of said years, 1900, 1901 and 1902, nor what portion of said
138 sum of $7243.28 mentioned in said indictment was received in each or any of said years, nor what portion thereof was for fees for liquor license applications, and what portion for fees for transfers of the same.

WM. WILHELM,
J. W. MOYER,
JAMES B. REILLY,
Att'ys for Defendant.

Endorsement: No. 905 Sept. Term, 1905—Comm'th *v.* John T. Shoener—Demurrer Filed Sept. 6, 1905, Isaac Ball, Clerk Sess. Wilhelm, Moyer, Reilly.

139 In the Quarter Sessions of the Peace in and for the County of Schuylkill.

905, Sept. Sessions, 1905.

COMMONWEALTH
v.
JOHN T. SHOENER.

Now September 6th, 1905.

Charles N. Berger, District Attorney, who prosecutes for the Commonwealth in answer to matters and things alleged and pleaded by the defendant, in his special plea filed, being the proceedings and discharge shown by the record of the Supreme Court to No. 286 January Term 1904, says the same is not sufficient in law to bar the prosecution of the defendant on the indictment in this case, and this the Commonwealth is ready to verify by the said record at 286 January Term 1904, and prays that the same may be inquired of by the court. Wherefore for want of a sufficient plea in this behalf he the said Charles E. Berger, District Attorney for the said Commonwealth prays judgment.

C. E. BERGER,
Dist. Att'y.

Endorsement: No. 905 Sept. Sessions, 1905—Commonwealth *v.* John T. Shoener. Demurrer to Defendant's Plea. Filed Sept. 7, 1905—Isaac Ball, Clerk Sess.

140 In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

Indictment No. 905, Sept. Sessions, 1905.

COMMONWEALTH OF PENNSYLVANIA
v.
JOHN T. SHOENER.

Charge—Embezzlement, under Section 65 of the act of 1860, with failure to pay over to the County of Schuylkill the sum of $7243.28. True bill, Monday, September 4th, 1905.

And now, September 6th, A. D. 1905, the defendant being brought before the court on the charge above stated preferred by the Commonwealth, and having heard the said indictment, No. 905 September Term, 1905, read and the matters therein contained, says that he ought not to be put to answer the said indictment, he having been heretofore in due manner of law acquitted of the premises specified and charged upon him therein, and for a plea to the said indictment he says that heretofore, to wit, on the fourth day of January A. D. 1904, at a session of the court duly convened,

he was duly arraigned upon a certain valid indictment founded upon and under said section 65, Act March 31, A. D. 1860, upon which the present indictment was founded, which charged him, the said John T. Shoener, in manner and form as follows:

"In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

No. 175, March Term, 1903.

November T., 1903.

COMMONWEALTH
v.
JOHN T. SHOENER.

SCHUYLKILL COUNTY, *ss:*

141 The Grand Inquest of the Commonwealth of Pennsylvania, inquiring for the body of the County of Schuylkill, upon their respective oaths and affirmations, do present and say that John T. Shoener, late of the said county, yeoman, heretofore, to wit, at the general election, held by the qualified electors of Schuylkill County on the seventh day of November, A. D. 1899, was duly elected Clerk of the Court of Quarter Sessions of the County of Schuylkill, to serve as such for the then next ensuing term, commencing on the first Monday of January 1900, and continuing thereafter for a period of three years.

That the said John T. Shoener did accept the said election and did file his bond and take the oath of office required by law and did on the first Monday of January, 1900, enter upon the duties of the said office as Clerk of the Court of Quarter Sessions of the Peace for the County of Schuylkill, a county then and now containing upwards of one hundred and fifty thousand in population, and continued in said office and exercised the duties, powers, rights and privileges of said office in and for the County of Schuylkill until January fifth, 1903.

That the said John T. Shoener, as Clerk of the Court of Quarter Sessions, aforesaid, was by law authorized and required to collect and receive from each applicant for a liquor license in said county, and from each applicant for a transfer of a liquor license previously granted the sum of five dollars, and was legally required on the first Monday of each and every month to pay to the Treasurer of the County of Schuylkill all fees so received from the preceding month, taking duplicate receipts therefor which receipts he was required to deposit with the County Controller, together with a transcript in detail of his fee and account book for the preceding month under oath, showing a true and correct list of all such fees received
142 *received* as aforesaid.

1. The Grand Inquest, aforesaid, upon their oaths and

affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the 7th day of January A. D. 1901, and divers other days and times before and since at the county of Schuylkill, and within the jurisdiction of this court with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the county of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications to a large amount, to wit, five thousand three hundred and eighty dollars, of the value of five thousand three hundred and eighty dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully, and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, and did use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest, the aforesaid sum of public moneys, and did prove a defaulter to the County of Schuylkill of the aforesaid sum of public moneys, and did fail to pay over the same when thereunto legally required by the County of
143 Schuylkill, through its duly authorized agents, to the Treasurer of the County of Schuylkill he being the proper officer authorized to demand and receive the same, contrary to the form of the act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

2. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the seventh day of January A. D. 1901, and on divers other days and times before and since, at the County of Schuylkill, and within the jurisdiction of this Court, with force and arms &c., being then and there the duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications to a large amount, to wit, five thousand three hundred and eighty dollars, of the value of five thousand three hundred and eighty dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly use by way of

investment in property and merchandise, the character of which is to your Grand Inquest as yet unknown, the said public moneys so collected, received and taken into his possession, contrary to
144 the form of the act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

3. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the 7th day of January A. D. 1901, and on divers other days and times before and since at the County of Schuylkill and within the jurisdiction of this court, with force and arms &c., being then and there duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there, whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications to a large amount, to wit, five thousand three hundred and eighty dollars, of the value of five thousand three hundred and eighty dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

4. And the Grand Inquest aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the 7th day of January A. D. 1901, and on divers other days and times before and since at the County of
145 Schuylkill, and within the jurisdiction of this court with force and arms &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect and take into his possession certain public moneys for fees on liquor license applications to a large amount, to wit, five thousand three hundred and eighty dollars, of the value of five thousand three hundred and eighty dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer as aforesaid, did fail to pay over the same, when thereunto required by the county of Schuylkill

or its legally authorized officers, to the treasurer of the county of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

The Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid on the 6th day of January A. D. 1902, and divers other days and times before and since, at the county of Schuylkill, and within the jurisdiction of this court, with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications and fees on applications for transfer of liquor licenses previously granted, did
146 by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand five hundred and sixty-five dollars, of the value of six thousand five hundred and sixty-five dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, and did use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest, the aforesaid sum of public moneys and did prove a defaulter to the County of Schuylkill of the aforesaid sum of public moneys, and did fail to pay over the same, when thereunto legally required by the County of Schuylkill, through its duly authorized agents, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

6. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the sixth day of January A. D. 1902, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this court, with force and arms &c., being then and there the duly elected and lawfully commissioned
clerk of the Court of Quarter Sessions of the County of
147 Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said

office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand five hundred and sixty-five dollars, of the value of six thousand five hundred and sixty-five dollars lawful money of the United States for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly use by way of investment in property and merchandise, the character of which is to your Grand Inquest as yet unknown, the said public moneys so collected, received and taken into his possesion, contrary to the form of the act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

7. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the sixth day of January, A. D. 1902, and on divers other days and times before and since at the County of Schuylkill and within the jurisdiction of this court, with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license ap-
148 plications and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand five hundred and sixty-five dollars, of the value of six thousand five hundred and sixty-five dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert of his own use the said public moneys so collected, received and taken into his possession, contrary to the form of the Act of Assembly, in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

8. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the 6th day of January, A. D. 1902, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this court with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid,

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and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there
149 whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said county of Schuylkill, receive, collect and take into his possession certain public moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand five hundred and sixty-five dollars, of the value of six thousand five hundred and sixty five dollars, lawful money of the United States for and in the name and on account of the county of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fail to pay over the same, when thereunto legally required by the county of Schuylkill or its legally authorized officers, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

9. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the 5th day of January, A. D. 1903, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this court with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, and fees on applications for transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there
whilst acting and holding said office of Clerk of the Court
150 of Quarter Sessions, of the said county of Schuylkill receive, collect, and taken into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand three hundred dollars, of the value of six thousand three hundred dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle, and convert to his own use the said public moneys so collected, received and taken into his possession, and did use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest, the aforesaid sum of public moneys and did prove a defaulter to the county of Schuylkill of the aforesaid sum of public moneys, and did fail to pay over the same, when thereunto legally required by the County of Schuylkill, through its duly authorized agents, to the Treasurer

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of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

10. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, on the 5th day of January, A. D. 1903, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this court, with force and arms, &c., being then and there the duly elected and lawfully commissioned clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications and fees on applications for the transfer of liquor
151 licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand three hundred dollars, of the value of six thousand three hundred dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer as aforesaid, did fraudulently, wilfully and corruptly use*d* by way of investment in property and merchandise, the character of which is to your Grand Inquest as yet unknown, the said public moneys so collected, received and taken into his possession, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

11. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the 5th day of January, A. D. 1903, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this court, with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there
152 whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, six thousand three hundred dollars, of the value of six thousand three hundred dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, re-

taken into his possession for safe keeping and transfer, did fraudulently, wilfully and corruptly embezzle and is own use the said public moneys so collected, received nto his possession, contrary to the form of the Act of such case made and provided, and against the peace of the Commonwealth of Pennsylvania.

the Grand Inquest, aforesaid, upon their oaths and aforesaid, do further present that John T. Shoener, the 5th day of January, A. D. 1903, and on divers nd times before and since at the County of Schuylkill, the jurisdiction of this court with force and arms, &c., and there the duly elected and lawfully commissioned Court of Quarter Sessions of the County of Schuylkill, d as such charged with the collection, safe keeping and ublic moneys, to wit, fees on liquor license applications, pplications for the transfer of liquor licenses previously by virtue of his said office of Clerk of the Court of ions of Schuylkill County, aforesaid, then and there and holding said office of Clerk of the Court of Quarter he said County of Schuylkill, receive, collect and take ession, certain public moneys for fees on liquor license cations, and fees on applications for the transfer of r licenses previously granted, to a large amount, to wit, ousand three hundred dollars, of the value of six thou- undred dollars, lawful money of the United States, for ame and on account of the County of Schuylkill, and llected, received and taken into his possession for safe transfer, as aforesaid, did fail to pay over the same, nto legally required by the county of Schuylkill or its rized officers, to the Treasurer of the County of Schuyl- g the proper officer authorized to demand and receive ntrary to the form of the act of Assembly in such case rovided and against the peace and dignity of the Com- f Pennsylvania.

the Grand Inquest, aforesaid, upon their oaths and aforesaid, do further present that John T. Shoener, the 7th day of October, A. D. 1902, and divers other es before and since at the County of Schuylkill, and risdiction of this court, with force and arms, &c., being re the duly elected and lawfully commissioned Clerk of Quarter Sessions of the County of Schuylkill, afore- uch charged with the collection, safe keeping and trans- moneys, to wit, fees on applications for the transfer nses previously granted, did by virtue of his said office the Court of Quarter Sessions of Schuylkill County, n and there whilst acting and holding said office of Court of Quarter Sessions of the said County of Schuyl- collect and take into his possession certain moneys for ications for the transfer of liquor licenses previously large amount, to wit, one hundred and sixty-five dol- value of one hundred and sixty-five dollars, lawful

money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer as
154 aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, and did use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest, the aforesaid sum of public moneys, and did prove a defaulter to the County of Schuylkill of the aforesaid sum of public moneys, and did fail to pay over the same when thereunto legally required by the County of Schuylkill, through its duly authorized agents, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania." To which last mentioned indictment he did then and there plead Not Guilty, and on the same day a jury was empannelled and sworn to try the said issue between the Commonwealth and the said John T. Shoener, and the trial thereof was proceeded with in due course. On January 6, A. D. 1904, the said jury upon their oaths found as follows: "Verdict, guilty as to counts four, eight and twelve, and not guilty as to any of the other counts of the within indictment." Said trial and the proceedings had thereon were reviewed by the Supreme Court of Pennsylvania on appeal to No. 286 January Term, 1904, whereupon it was considered, adjudged and decreed by the said Supreme Court that the said John T. Shoener should go thereof acquitted, as appears by the records of said proceedings now remaining here in court.

And the said John T. Shoener avers that the said John T. Shoener mentioned in said former indictment, and he, the said John T. Shoener charged in this present indictment, are one and the same person, and not divers and different persons.

And the said John T. Shoener further avers that said sum
155 of $7243.28 mentioned in the above stated indictment as having been received by the said defendant, but which he is alleged to have refused to pay over when demanded by said F. J. Noonan, County Trasurer, &c., was and is a part of, covered by and included in the said several sums of money mentioned in the said indictment, proceedings and judgment thereon to No. 175 March Term, 1903, and no other moneys whatever than those; that the misdemeanor and offense charged and laid in the former indictment, and the misdemeanor and offense in the present indictment mentioned are one and the same misdemeanor and offense, and not divers and different misdemeanors and offenses, and this he is ready to verify.

Wherefore, defendant prays judgment of the court here if he ought to be put further to answer the present indictment, and whether the commonwealth ought to further prosecute or impeach him, the said John T. Shoener, on account of the premises in the present indictment contained, and that he may be dismissed, &c.

JOHN T. SHOENER.

Endorsement: No. 905, Sept. T. 1905, Commonwealth *v.* Shoener. Plea *Autrefois Acquit*—Filed Sept. 7, '05, Isaac Ball, Clerk Sess. J. W. Moyer, Jas. B. Reilly, Wm. Wilhelm, Attys. for deft.

156 In the Court of Quarter Sessions.

No. 905, Sept. T., 1905.

COM'TH
v.
JOHN T. SHOENER.

And now, Sept. 8th, 1905, the attorneys for the defendant, move in arrest of judgment and for a new trial reserving the right to file reasons within four days.

JAMES B. REILLY,
JOSEPH W. MOYER, AND
WM. WILHELM,
For Defendant.

Endorsement: No. 905 Sept. T. 1905, Comth. *v.* John T. Shoener, Motion in arrest of judgment and for a new trial. Filed Sept. 8, 1905, Isaac Ball, Clerk Sess. James B. Reilly, Joseph W. Moyer, Wm. Wilhelm, Attys.

157 In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

No. —, September Term, 1905.

COMMONWEALTH OF PENNSYLVANIA
v.
JOHN T. SHOENER.

John T. Shoener, by his counsel, hereby files the following reasons for a new trial:

The Court erred—

1. In not sustaining the demurrer.
2. In not sustaining the plea, *autrefois acquit.*
3. In admitting testimony barred by the statute of limitations.
4. On the issue raised before the jury on the plea of *autrefois acquit,* in giving binding instructions to the jury, directing a verdict against the defendant and for the Commonwealth.
5. In not affirming the points of defendant.
6. In its general charge to the jury.

J. W. MOYER,
JAMES B. REILLY,
WM. WILHELM,
Att'ys for Def't.

Endorsement: No. — September Term, 1905, Commonwealth *v.* John T. Shoener, Reasons for a New Trial, Sept. 11, 1905, filed O. P. B., Isaac Ball, Clerk Sess. J. W. Moyer, Jas. B. Reilly, Wm. Wilhelm, Attys for Deft.

158 In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

No. 905, September Term, 1905.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOHN T. SHOENER.

Embezzlement.

Before Hon. O. P. Bechtel, P. J.

WEDNESDAY, *September* 6, 1905—10.00 a. m.

Present: Charles E. Berger, Esq., District Attorney; Guy E. Farquhar and John F. Whalen, Esqrs., for the Commonwealth.
William Wilhelm, James B. Reilly and J. W. Moyer, Esqrs., for Defendant.

Mr. BERGER: May it please the Court, in the case of Commonwealth *vs.* John T. Shoener, on a charge of embezzlement, to No. 905, September Term, 1905, we now call upon the Defendant to enter his plea.

Mr. MOYER: May it please your Honor, in this case of the Commonwealth against John T. Shoener, as Defendant's counsel and on behalf of Defendant we are prepared to file a plea of former acquittal, but before doing so we desire to state that we may have to demur to the indictment when we come to answer the indictment, and by filing this plea we would like to have it understood that we are not waiving our right to take such exception at the proper time.

159 Mr. FARQUHAR: I would state that the proper order is, first, demurrer and next a plea. If they desire to demur, now is the time to demur. After they have pleaded it is too late to demur, whether by special or general plea. The plea of former acquittal is a special plea, and it is too late, after the filing of such a plea, to demur to the indictment.

Mr. MOYER: That is not our understanding, and I think we can show ample authority to the contrary. This is a plea that must be determined before the question on the indictment itself arises, and this plea raises an issue of fact, as we take it, which must be determined either by a jury or by a demurrer on the part of the Commonwealth to this plea. In either case, the issue on the plea will be disposed of, and then we come to answer the charges in the indictment. To that we may plead guilty, we may plead not guilty, or we may demur; and we are prepared to present this plea and then

go on in the regular order, and if there is any question about the regularity, we are ready to cite authorities.

Mr. REILLY: We would say the proposition of the counsel for the Commonwealth is correct in part. The pleading of the general issue not guilty would be a waiver of a right to file a demurrer or a motion to quash, but I do not agree with him that the filing of a special plea is such a waiver. But out of the abundance of precaution, to avoid any controversy on that question, we make the statement now we desire to take a demurrer, and have it ready and are prepared to file it. It is simply a question of course of procedure, which we are entirely willing to submit to the Court, and if it is thought better to file the demurrer now and have it heard and disposed of, we are ready to file it and take it up. Our idea was that if the plea of *autrefois acquit*, which we propose to file, should be maintained, it is an end to this prosecution, and there would be no further necessity to trouble the Court with either a demurrer or a plea or
160 any other motion or procedure whatever.

The COURT: We will have no suggestion to make; we will take just what you present to us and try to dispose of it as we go along.

Mr. REILLY: To avoid any question, we will file the demurrer now; then it will be of record. We want to file the demurrer first; it is understood that it is filed first.

(Mr. Reilly reads demurrer, as follows:)

In the Court of Quarter Sessions of the Peace in and for Schuylkill County.

905, September Term, 1905.

COMMONWEALTH
vs.
JOHN T. SHOENER.

The Defendant, not confessing or acknowledging all or any of the matters and things in said indictment alleged to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer doth say:

First. That said indictment is defective and insufficient in law, in that it appears on its face that the said Defendant was not a county officer at the time the alleged demand was made upon him to pay over the moneys mentioned in said indictment, and the 65th section of the Act of 31 March, 1860, upon which said indictment is based, does not apply.

Second. That said indictment is defective and insufficient in law, in that it contains in the same count three separate and distinct alleged offences, in that he received and failed to pay over certain moneys at three different times, to wit, in the years 1900, 1901 and 1902.

Third. That the offence charged in said indictment is barred by the statute of limitations, the same having being found more than

two years after the moneys alleged to have been received by
161 the Defendant and which he failed to pay over, came into his hands.

Fourth. That the said indictment is defective and insufficient because it is vague and indefinite, in that it does not allege or specify what amount of money was collected or received by Defendant, for each of said years 1900, 1901 and 1902, nor what portion of said sum of $7,243.28 mentioned in said indictment was received in each or any of said years, nor what portion thereof was for fees for liquor license applications and what portion for fees for transfers of the same.

WILLIAM WILHELM,
JOSEPH W. MOYER,
JAMES B. REILLY,
Att'ys for Defendant.

Mr. REILLY: We are ready to take up this demurrer now. Of course, as I said about the plea of *autrefois acquit*, if this demurrer is sustained by the Court, it also will be an end to this prosecution, and we do not care which horn of the dilemma our friends upon the other side choose to drive us to. We will take either one or both.

Mr. BERGER: My own opinion in the case is that practically the same questions would be raised, to a certain extent, and run into one another, on the demurrer and on the special plea, and without suggesting what course they shall pursue we are ready to proceed now on the demurrer or as they——

Mr. WILHELM: The only issue now is the demurrer, according to Mr. Farquhar.

Mr. BERGER: Proceed and discuss it.

The COURT: Proceed.

Mr. REILLY: So that there will be no misunderstanding, this indictment is under the 65th section of the Act of 1860?

Mr. BERGER: Charging failure to pay over, yes, sir; demand made June 30, 1905.

162 (Mr. Reilly argues demurrer.)

Mr. Moyer cites:

Com. *vs.* Ruffner, 28 Pa. 259;
Gise *vs.* Com., 81 Pa. 428;
Com. *vs.* Bartilson, 85 Pa. 482;
Guarantee Trust Co. *vs.* Nat. Bank, 202 Pa. 94;
Link *vs.* McLeod, 194 Pa. 566;
Dunlap *vs.* Linton, 144 Pa. 335.
Noonan *vs.* Pardee, 200 Pa. 474.

Mr. BERGER: In order to simplify the proposition involved here, we will now state that we do not contend that the Act of 1878, extending the period of limitations to four years, applies to this case.

The COURT: You do not contend that?

Mr. BERGER: No, sir. We do this because this question was eliminated from the previous trial because there was so much doubt in the mind of the trial Judge that he would not sentence upon the

unt upon which that depended; and our contention is simply this, at the crime with which this Defendant is charged was not committed until demand was made upon him on the 30th of June, 1905, the proper officer, designated practically by the decision of the upreme Court. We deny that the statute of limitations began to n on the 11th of May, 1903, when the remittitur in the civil issue, on the right to withhold these moneys, was filed in this court.

Mr. Berger cites:

Com. *vs.* Mentzer, 162 Pa. 646;
U. S. *vs.* —, 98 U. S. Sup. Ct. Rep., 450.

(Mr. Reilly replies.)
(Recess until two o'clock P. M.)

3 2:00 P. M.

(Mr. Wilhelm closes argument on demurrer.)

The COURT: As to the first cause of demurrer, which is to the fect that demand was not made on the defendant during the time at he was an officer, and that, therefore, the 65th section of the Act 31 March, 1860, does not apply in this case, we can only say that e cannot agree with this proposition. We do not believe that the ght to prosecute a public officer for failing to pay over money after has been required to make payment, depends upon whether or t he is at the time in the office, but rather whether the moneys he called upon to pay were received by him while he was in the office d as a public official, and therefore we cannot sustain this propoion.

As to the second, which is in effect that the indictment now be- re us contains three separate and distinct offences in one count, we not so understand this indictment. This is based upon the propoion, as appears from this cause of demurrer, that part of the money, appears from the indictment, was collected in 1900, part in 1901, d part in 1902. It does not follow that the party who had a right demand this money was required to bring a prosecution for each e of these three years, separately, or to make a demand for the oneys received for each year separately, any more than the county proper officer would be required to make demand for the money ceived each particular month. We cannot believe that it is necesry to bring a prosecution for each year, any more than it would necessary to do it for each month, but believe that the county or oper officer of the county may make a demand for the moneys reived during the time that the Defendant was an official, and as d by virtue of his relation to the county as official, and therefore we do not sustain that.

4 As to the fourth, which in effect charges that the indictment is insufficient because it does not furnish sufficient inrmation as to what it is that constitutes the $7,243.28 alleged to ve been appropriated, or rather embezzled, as the act terms it, and cause it does not state what particular amount was received by him each particular one of the three years, we think it is sufficient to y, in answer to that, that the indictment sets forth an indictable

offence on its face, and alleges three periods during which money was received by him as a public official, and also states specifically and to the cent the amount claimed. If this was not sufficient to give to the Defendant information such as he may deem necessary in making his defence, the remedy was, before this case attached, which now has been on trial since morning, to have made application to the Court, suggesting wherein it was deficient to furnish proper information and then ask for a bill of particulars. This period seems now to be past. That this was not done is no fault on the part of the Commonwealth, if the indictment itself charges an indictable offence, and we are led to believe that it does, because it is in the language of the act under which it is drawn, and that it sufficiently sets forth the crime charged.

As to the third cause of demurrer, which raises the question of the statute of limitations, alleging "that the offence charged in said indictment is barred by the statute of limitations, the same having been found more than two years after the moneys alleged to have been received by the Defendant, and which he failed to pay over, came into his hands," if we believed, under the particular circumstances of this case, that the statute of limitations began to run from the time that he received this money, as this clause says, we would be disposed to sustain this proposition, but we cannot accept that view of it under the decision of the Supreme Court in this particular case. If that were correct, of course two years from the time
165 the money reached his hands, a good part of which had reached his hands back in 1900, according to the indictment, or some of it, at least, in 1900 and 1901—as to that money the right to prosecute would have been barred long ago, and before the Supreme Court ever decided the previous trial, which we think is not the case, and which we think is plainly indicated by the language of the Supreme Court. Now in this opinion it is held that the demand made in December, 1902, was not authorized; that it could not be made, because the civil proceeding had not then been decided. It had been decided in this Court, but it was pending in the higher Court. Subsequently they affirmed the action of this Court, but Justice Brown, in delivering the opinion of the Supreme Court, says, that it was competent for these parties to make the agreement known as the case stated, during the pendency of which the Defendant could not be called upon to pay over the money, until there was a determination deciding which of the parties claiming it had a right to it, whether the County of Schuylkill or the Defendant. He thereby recognized the right of the parties to suspend the making of a demand, and enforces that right in favor of the Defendant, to the extent of preventing the County from making, or holding that the County could not make such a demand, during the existence of that civil proceeding; and then, in discussing that, he points out, as we understand the ruling of the Court, what character of demand will be considered sufficient in a criminal case, such as this, under the circumstances of this particular case, and we will read a portion of this, as indicating the kind of demand that would be required: "The learned trial Judge charged the jury that the institution of the suit

in the common pleas of the County was a legal demand for the payment of the money and should be regarded as such demand in the prosecution of the appellant on the counts charging him with failing to pay over on demand. In the civil courts constructive de-
166 mands may be and are recognized, but not so in a criminal court, in the prosecution for an offence having as one of the statutory ingredients a refusal to pay on demand."

Now the Act says, "or fail to pay over the same when thereunto legally required by the State, County or Township Treasurer or other proper officer or person authorized to demand and receive the same." Justice Brown says, "A demand there means actual demand. The only actual demand that the Commonwealth pretends to have made was the Controller's letter. It was written after the institution of the civil suit and after the distinct agreement by the County that the question of Defendant's liability should be judicially determined. Before being so determined, there was no liability to be enforced against him civilly and therefore no demand could be made upon him that he was bound to recognize," and then goes on to state that he had been acquitted of the other offences.

Under this language, we are led to the conclusion that until a demand was made after this decision, until a demand was made, no crime for failing to pay over the money existed. We think that is a fair interpretation of the language of the Supreme Court. If, therefore, no crime existed for not paying this money over until after a demand was made, it follows, in my judgment, that until that demand was made, there was no right of prosecution, and I do not know of any authority that holds that the right to prosecute can be barred before the right to prosecute exists; consequently I am led to the conclusion that the right to prosecute existed after the demand was made, and the alleged crime was committed when there was a refusal to pay over that money, or a failure to pay it over after such demand, and that the statute of limitations, under this language, would seem to begin to run from that time, upon the proposition that it could not begin to run until the right to prosecute existed. Whether we are giving an interpretation of this case such as
167 the higher Court will place upon it, if the future of the case makes it necessary, we will only learn when they determine, but we are unable at this time, from anything that is now before us, to say that the right to maintain this prosecution is barred by limitation, under this language.

Mr. REILLY: Will your Honor permit me to add, as an amendment to my third ground of demurrer, so that I may have the benefit of it on the record—it will not affect your Honor's decision—by including the words, "That the indictment was not found within two years from the time it was judicially determined, May 11, 1903, that the Defendant was liable for the license fees received by him."

The COURT: You can file that among your reasons.

Mr. REILLY: Your Honor will note us an exception and seal us a bill?

The COURT: Certainly.

Defendant excepts. Bill sealed.

Mr. BERGER: We call upon the Defendant to plead.

Mr. MOYER: On behalf of the defendant I desire to file the following plea:

In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

Indictment No. 905, Sept. Sessions, 1905.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOHN T. SHOENER.

Charge—Embezzlement, under Section 65 of the Act of 1860, with failure to pay over to the County of Schuylkill the sum of $7,243.28. True bill, Monday, September 4th, 1905.

168 And now, September 6th, A. D. 1905, the Defendant being brought before the Court on the charge above stated preferred by the Commonwealth, and having heard the said indictment, Number 905 September Term, 1905, read and the matters therein contained, says that he ought not to be put to answer the said indictment, he having been heretofore in due manner of law acquitted of the premises specified and charged upon him therein, and for a plea to the said indictment he says that heretofore, to wit, on the fourth day of January, A. D. 1904, at a session of the Court duly convened, he was duly arraigned upon a certain valid indictment founded upon and under said Section 5, Act of March 31, A. D. 1860, upon which the present indictment was founded, which charged him, the said John T. Shoener, in manner and form as follows:

"In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

No. 175, March Term, 1903.

November T., 1903.

COMMONWEALTH
vs.
JOHN T. SHOENER.

SCHUYLKILL COUNTY, *ss:*

The Grand Inquest of the Commonwealth of Pennsylvania, inquiring for the body of the County of Schuylkill, upon their respective oaths and affirmations, do present and say that John T. Shoener, late of the said County, yeoman, heretofore, to wit, at the general election, held by the qualified electors of Schuylkill County on the seventh day of November, A. D. 1899, was duly elected Clerk

of the Court of Quarter Sessions of the County of Schuylkill, to serve as such for the then next ensuing term, commencing on the first Monday of January, 1900, and continuing thereafter for a period of three years.

169 That the said John T. Shoener did accept the said election, and did file his bond and take the oath of office required by law and did on the first Monday of January, 1900, enter upon the duties of the said office as Clerk of the Court of Quarter Sessions of the Peace for the County of Schuylkill, a county then and now containing upwards of one hundred and fifty thousand in population, and continued in said office and exercised the duties, powers, rights and privileges of said office in and for the County of Schuylkill until January fifth, 1903.

That the said John T. Shoener, as Clerk of the Court of Quarter Sessions, aforesaid, was by law authorized and required to collect and receive from each applicant for a liquor license in said County, and from each applicant for a transfer of a liquor license previously granted the sum of Five Dollars, and was legally required on the first Monday of each and every month to pay to the Treasurer of the County of Schuylkill all fees so received from the preceding month, taking duplicate receipts therefor, which receipts he was required to deposit with the County Controller, together with a transcript in detail of his fee and account book for the preceding month under oath, showing a true and correct list of all such fees received as aforesaid.

1. The Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the seventh day of January, A. D. 1901, and divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this Court with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting

170 and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession, certain moneys for fees on liquor license applications to a large amount, to wit, Five Thousand Three Hundred and Eighty Dollars, of the value of Five Thousand Three Hundred and Eighty Dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession and did use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest, the aforesaid sum of public moneys, and did prove a defaulter to the County of Schuylkill of the aforesaid sum of public moneys, and did

fail to pay over the same when thereunto legally required by the County of Schuylkill, through its duly authorized legal agents, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

2. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the seventh day of January, A. D. 1901, and on divers other days and times before and since, at the County of Schuylkill, and within the jurisdiction of this Court, with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license appli-
171 cations, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications to a large amount, to wit, Five Thousand Three Hundred and Eighty Dollars, of the value of Five Thousand Three Hundred and Eighty Dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly use by way of investment in property and merchandise, the character of which is to your Grand Inquest as yet unknown, the said public moneys so collected, received and taken into his possession, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

3. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present, that John T. Shoener, aforesaid, on the 7th day of January, A. D. 1901, and on divers others days and time before and since at the County of Schuylkill, and within the jurisdiction of this Court, with force and arms, &c., being then and there, duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there, whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications
172 to a large amount, to wit, Five Thousand Three Hundred and Eighty Dollars, of the value of Five Thousand Three Hundred and Eighty Dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having

so collected, received, and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

4. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the seventh day of January A. D. 1901, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this Court with force and arms &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain public moneys for fees on liquor license applications to a large amount, to wit, Five Thousand Three Hundred and Eighty Dollars, of the value of Five Thousand Three Hundred and Eighty Dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fail to pay over the same, when
173 thereunto required by the County of Schuylkill or its legally authorized officers, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

5. The Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the sixth day of January A. D. 1902, and divers other days and times before and since, at the County of Schuylkill, and within the jurisdiction of this Court, with force and arms, &c. being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications and fees on applications for transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, Six Thousand Five Hundred and Sixty-five Dollars, of the value of Six Thousand Five Hundred and Sixty-five Dollars, lawful money of the United States for and in the name and on ac-

count of the County of Schuylkill, and having so collected, received, and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, and did use by way of investment in property and merchandise, the nature and character of which are as
174 yet unknown to your Grand Inquest, the aforesaid sum of public moneys and did prove a defaulter to the County of Schuylkill of the aforesaid sum of public moneys, and did fail to pay over the same, when thereunto legally required by the County of Schuylkill, through its duly authorized agents, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

6. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the sixth day of January, A. D. 1902, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this Court, with force and arms, &c., being then and there duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, Six Thousand Five Hundred and Sixty-five Dollars, of the value of Six Thousand Five Hundred and Sixty-five Dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and
175 transfer, as aforesaid, did fraudulently, wilfully and corruptly use by way of investment in property and merchandise, the character of which is to your Grand Inquest as yet unknown, the said public moneys so collected, received and taken into his possession, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

7. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the sixth day of January, A. D. 1902, and on divers other days and times before and since at the County of Schuylkill and within the jurisdiction of this Court, with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill aforesaid, and as such charged with the collection, safe keeping and transfer

of public moneys, to wit, fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect, and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses pre-iously granted to a large amount, to wit, Six Thousand Five Hundred and Sixty-five Dollars, of the value of Six Thousand Five Hundred and Sixty-five Dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so
176 collected, received and taken into his possession, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

8. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the sixth day of January, A. D. 1902, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this Court with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications, and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain public moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, Six Thousand Five Hundred and Sixty-five Dollars, of the value of Six Thousand Five Hundred and Sixty-five Dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fail to pay over the same, when thereunto legally required by the County of Schuylkill, or its legally authorized officers, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and
177 provided and against the peace and dignity of the Commonwealth of Pennsylvania.

9. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the fifth day of January, A. D. 1903, and on divers other days and times before and since at the County of Schuylkill,

and within the jurisdiction of this Court with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications and fees on applications for transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, Six Thousand Three Hundred Dollars, of the value of Six Thousand Three Hundred Dollars, lawful money of the United States for and in the name and in account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, and did use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest, the aforesaid sum of public moneys and did prove a defaulter to the County of Schuylkill of the aforesaid sum of public moneys, and did fail to pay over the same, when thereunto legally required by the County of
178 Schuylkill, through its duly authorized agents, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

10. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, on the fifth day of January, A. D. 1903, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this Court, with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, Six Thousand Three Hundred Dollars, of the value of Six Thousand Three Hundred Dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer as aforesaid, did fraudulently, wilfully and corruptly use

by way of investment in property and merchandise, the character of which is to your Grand Inquest as yet unknown, the said public moneys so collected, received and taken into his possession, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

11. And the Grand Inquest, aforesaid, upon their oath- and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the fifth day of January, A. D. 1903, and on divers other days and times before and since at the County of Schuylkill and within the jurisdiction of this Court, with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted to a large amount, to wit, Six Thousand Three Hundred Dollars, of the value of Six Thousand Three Hundred Dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received, and taken into his possession for safe keeping and transfer, as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

12. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the fifth day of January, A. D. 1903, and on divers other days and times before and since at the County of Schuylkill, and within the jurisdiction of this Court with force and arms, &c., being then and there the duly elected and lawfully commissioned Clerk of the Court of Quarter Sessions of the County of Schuylkill aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to wit, fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession, certain public moneys for fees on liquor license applications and fees on applications for the transfer of liquor licenses previously granted, to a large amount, to wit, Six Thousand Three Hundred Dollars, of the value of Six Thousand

Three Hundred Dollars, lawful money of the United States for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping, and transfer, as aforesaid, did fail to pay over the same, when thereunto legally required by the County of Schuylkill or its legally authorized officers, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

13. And the Grand Inquest, aforesaid, upon their oaths and affirmations, aforesaid, do further present that John T. Shoener, aforesaid, on the seventh day of October, A. D. 1902, and divers other days and times before and since, at the County of Schuylkill, and within the jurisdiction of this Court, with force and arms &c., being then and there the duly elected and lawfully commis-
181 sioned Clerk of the Court of Quarter Sessions of the County of Schuylkill, aforesaid, and as such charged with the collection, safe keeping and transfer of public moneys, to-wit, fees on applications for the transfer of liquor licenses previously granted, did by virtue of his said office of Clerk of the Court of Quarter Sessions of Schuylkill County, aforesaid, then and there whilst acting and holding said office of Clerk of the Court of Quarter Sessions of the said County of Schuylkill, receive, collect and take into his possession certain moneys for fees on applications for the transfer of liquor licenses previously granted to a large amount, to-wit, One Hundred and Sixty-five Dollars, of the value of One Hundred and Sixty-five Dollars, lawful money of the United States, for and in the name and on account of the County of Schuylkill, and having so collected, received and taken into his possession for safe keeping and transfer as aforesaid, did fraudulently, wilfully and corruptly embezzle and convert to his own use the said public moneys so collected, received and taken into his possession, and did use by way of investment in property and merchandise, the nature and character of which are as yet unknown to your Grand Inquest, the aforesaid sum of public moneys and did prove a defaulter to the County of Schuylkill of the aforesaid sum of public moneys, and did fail to pay over the same when thereunto legally required by the County of Schuylkill, through its duly authorized agents, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

To which last mentioned indictment he did then and there plead Not Guilty, and on the same day a jury was empanelled and sworn to try the said issue between the Commonwealth and the said
182 John T. Shoener, and the trial thereof was proceeded with in due course. On January 6, A. D. 1904, the said jury upon their oaths, found as follows: "Verdict, guilty as to counts four, eight and twelve, and not guilty as to any of the other counts of the

within indictment." Said trial and the proceedings had thereon were reviewed by the Supreme Court of Pennsylvania, on appeal to Number 286, January Term, 1904, whereupon it was considered, adjudged and decreed by the said Supreme Court that the said John T. Shoener should go thereof acquitted, as appears by the records of said proceedings now remaining here in court.

And the said John T. Shoener avers that the said John T. Shoener mentioned in said former indictment, and he, the said John T. Shoener charged in the present indictment, are one and the same person, and not divers and different persons.

And the said John T. Shoener further avers that said sum of $7,243.28 mentioned in the above stated indictment as having been received by the said defendant, but which he is alleged to have refused to pay over when demanded by said F. J. Noonan, County Treasurer &c., was and is a part of, covered by and included in the said several sums of money mentioned in the said indictment, proceedings and judgment thereon to Number 175, March Term, 1903, and no other moneys whatever than those; that the misdemeanor and offence charged and laid in the former indictment, and the misdemeanor and offence in the present indictment mentioned are one and the same misdemeanor and offence, and not divers and different misdemeanors and offences, and this he is ready to verify.

Wherefore, defendant prays judgment of the Court here, if he ought to be put further to answer the present indictment, and whether the Commonwealth ought to further prosecute or impeach him, the said John T. Shoener, on account of the premises
183 in the present indictment contained, and that he may be dismissed, &c.

(Signed) JNO. T. SHOENER.

Mr. BERGER: We desire to demur to this plea.

The COURT: Demur to what this record contains, to the sufficiency of the record?

Mr. BERGER: Yes, sir.

The COURT: To sustain their plea?

Mr. BERGER: Yes, sir; I will read the demurrer to this special plea:

In the Court of Quarter Sessions of *of* the Peace in and for the County of Schuylkill.

905, September Sessions, 1905.

COMMONWEALTH
vs.
JOHN T. SHOENER.

Now, September 6, 1905, Charles E. Berger, District Attorney, who prosecutes for the Commonwealth, in answer to the matters and things alleged and pleaded by the defendant in his special plea filed,

being the proceedings and discharge shown by the record of the Supreme Court to No. 286, January Term, 1904, says, the same is not sufficient in law to bar the prosecution of the defendant on the indictment in this case, and this the Commonwealth is ready to verify by the said record at 286 January Term, 1904, and prays that the same may be inquired of by the Court. Whereupon, for want of a sufficient plea on this behalf, he, the said Charles E. Berger, District Attorney for the said Commonwealth, prays judgment.

(Signed) CHARLES E. BERGER,
District Attorney.

We ask leave to file this demurrer to the plea.

The COURT: Yes, sir. In order that the Court may know what you charge or assert in this plea, must you not get*h* the rec-
184 ord before the Court?

Mr. REILLY: We must prove that, yes.

The COURT: The Court can only decide upon the record, and that must come before the Court.

Mr. REILLY: The effect of the filing of the demurrer in law, is to admit all the averments in our plea.

The COURT: The demurrer filed here admits the existence of this record and says, even if such record does exist, that is not sufficient.

Mr. REILLY: It admits all the averments in our plea, that we were tried once before and acquitted upon the same charge.

The COURT: Oh no. If it admits that, what is the use in having any record? What is the use of arguing anything?

Mr. REILLY: The plea of *autrefois acquit* is the same as any other plea.

Mr. Moyers cites:

Dinkey *vs.* Commonwealth, 17 Pa. 126.
Com. *vs.* Mentzer, 167 Pa. 648.
Heikes *vs.* Commonwealth, 26 Pa. 513.
Com. *vs.* Arner, 149 Pa. 35.
Bannerman *vs.* State of Ohio, 30 O. 264.
Solliday *vs.* Commonwealth, 28 Pa. 13.
Altenburg *vs.* Commonwealth, 126 Pa. 602.

Mr. Berger cites:

Com. *vs.* Zepp, 3 Clark 311.
Com. *vs.* Hazlett, 14 Sup. 353.
Com. *vs.* Hazlett, 16 Sup. 534.
Com. *vs.* Rockafellow, 3 Sup. 588.
Com. *vs.* Hilands, 114 Pa. 372.
Com. *vs.* Trimmer, 84 Pa. 69.

Mr. Farquhar cites:

Com. *vs.* Walker, 15 C. C. R., 418.

Mr. Reilly offers in evidence the entire record of the for-
185 mer trial of Commonwealth *vs.* Shoener.

Mr. Reilly cites:
Solliday *vs.* Commonwealth, 28 Pa. 14.
State *vs.* Mason, 8 Northeastern Reporter, 716.
Com. *vs.* Demuth, 12 S. & R. 389.
Com. *vs.* Clue, 3 R. 498.
1 Wharton on American Crim. Law, Sec. 540, 541, 551.

(Adjourned until Thursday, September 7, 1905, 9:00 A. M.)

THURSDAY, *September* 7, 1905—9:00 a. m.

Counsel present as before.

The COURT: The offence charged in the indictment now before us is drawn under this language in the 65th section of the Act of 1860: "Or fail to pay over the same when thereunto legally required by the state, county or township treasurer or other proper officer or person authorized to demand and receive the same." We have before us a plea of former acquittal on the part of the Defendant as against this charge, by reason of the trial on the previous indictment, and we want to say now that this record, as now presented to us, shows a trial of this same Defendant on an indictment charging him in thirteen different counts. Of the thirteen counts contained in that indictment, he was acquitted of the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh and thirteenth. Nine of these counts, being the ones first named, or all those excepting the thirteenth, charge him with embezzlement and the conversion of money to his own use, received for license fees. The thirteenth charges him with a like offence, excepting that it was for moneys received for transfers. The fourth, eighth and twelfth charge him simply with having failed to pay over the license
186 fees "when thereunto legally required by the County of Schuylkill or its legally authorized officers, to the Treasurer of the County of Schuylkill."

Now, in the first place it is contended on the part of the Defendant, as we understand his counsel, that the ten counts, or some of the ten counts of which he was acquitted, contain the charge of failing to pay over the moneys that he received in his office as an official, license moneys, for licenses and for transfers. We cannot accept this construction of the first indictment nor of the contents of these particular counts. It would lead to a somewhat awkward position to say that the Defendant had first or during the trial been acquitted in these counts of not paying the money over, and then convicted on the fourth, eighth and twelfth, of not paying it over, or, in other words, both convicted and acquitted in the same trial and on the same indictment. We think if any such construction as this could be placed on the counts as contended for by Defendant, the Supreme Court, when this case was before them, or the former case, instead of simply saying that there was no demand, would have said that the result of a verdict of not guilty on the other nine or ten counts, or whatever number of them are claimed to charge this same offence, would be such that he could not be convicted on the fourth, eighth and twelfth, but that he must be regarded as acquitted of all.

This would be exactly in line with the contention in Commonwealth *vs.* Weiderhold, 112 Pa., where, in our own county, in the first count they charged the party with arson, and in the second count intended to charge him with firing a building not a part and parcel of a dwelling house, but omitted the word "not," leaving it standing exactly the same as the charge contained in the first count, and it was held by the Supreme Court that he was acquitted, and I
187 think such would be the effect if the counts named in this indictment that I have named, as being the ones of which he was acquitted, charged the same offence, or if any one of them did charge the same offence that was found in the fourth, eighth and twelfth. But we cannot regard the counts as charging the same offence. We believe that the fourth, eighth and twelfth; just as the Supreme Court say in its opinion, charge nothing excepting a failure to pay over.

Now it is claimed—it being admitted, of course, that this Defendant is the same party who was defendant in the former indictment—that the trial of the former charge was a trial of the same charge that is now contained in the present indictment against him. We will refer to but two authorities, because in those authorities there are numerous other authorities referred to, and we will not take the time to refer to all of them. First we refer to the case of Commonwealth *vs.* Tadrick, 1 Sup. 564, beginning with this portion: "Returning to the plea of *autrefois acquit*, it was held in Heikes *vs.* Commonwealth, 26 Pa. 513 (citing People *vs.* Bauste, 1 John. 66), that 'the true test to ascertain whether the plea of *autrefois acquit* be a good bar is, whether the evidence necessary to support the second indictment would have been sufficient to secure a legal conviction on the first.'" This is made one of the tests, and we think we need not say that the evidence necessary to sustain a conviction on this indictment would not sustain a conviction on the previous indictment, because it would leave as absent one of the elements of the crime. It would leave the previous indictment standing without any demand, and without the demand there would be no crime, and a demand made after that prosecution was instituted and the indictment found could not be presented upon the trial of that case. Therefore, the evidence would not sustain a conviction on the first count of the indictment;
188 that is, the evidence that would be n-cessary for a conviction, under this language, "The true test to ascertain whether the plea of *autrefois acquit* be a good bar is, whether the evidence necessary to support the second indictment would have been sufficient to secure a legal conviction on the first,"—we say the evidence necessary to support the second indictment would not procure a legal conviction on the first, because the evidence would not be admissible and the crime would have no legal existence, there being no demand.

Now we will take the case in 84 Pa. (Com. *vs.* Trimmer, 84 Pa. 65), because these cases seem to be a statement of the principle in the reverse order, one the opposite of the other. "Whether the former acquittal was for the same offence depends on the record pleaded. and not on the argument or inference deducted therefrom. The defendants plead in bar a former trial on no other indictment

than the one set forth in the plea. If that record shows that the evidence necessary to support a conviction on the present indictment, would have been insufficient to procure a legal conviction on the former, the plea of *autrefois acquit* is not sustained." That is the reverse statement. For the reason that we have just given, it must necessarily follow that such would be the case, and that it could not be held as a plea under this rule; and this case also shows that it is the duty of the Court, under such circumstances as these, to declare the effect of that which has been presented.

In addition to the cases cited, for instance, the cases of Com. *vs.* Trimmer, which I have just cited; Hilands *vs.* Com., 114 Pa.; Com. *vs.* Montross, 8 Sup.; Com. *vs.* Zepp, 3 Clark (which is not a Supreme Court decision, however); Com. *vs.* Hilands, 111 Pa., and also Altenburg *vs.* Com., 126 Pa., we want to put upon record that under the ruling of the Supreme Court in this very case the Supreme
189 Court show that it is an absolute*ly* necessity that there should be an actual demand, without which there would be no crime. The failure to pay on demand, as contemplated by the statute under which he is indicted, is a failure to pay that which, at the time the demand was made, belonged to the County making the demand. Then further on he says, "A demand there means an actual demand," and points out that a constructive demand, such as would arise from a judgment, which would be a demand in a civil court, would not be a sufficient demand in this case; and why? Because the Act of Assembly, as we understand this ruling, renders that absolutely necessary—"or fail to pay over the same when thereunto legally required by the state, county or township treasurer or other proper officer or person authorized to demand and receive the same," consequently this case stands in the position, so far as this crime is concerned, of having had no legal existence until the demand was made, or otherwise this language cannot be understood. Therefore we are led to the conclusion, based upon this very language and the language of that Act of Assembly, that until a legal demand was made by a party who was authorized to make it and receive the money, the Defendant was not called upon to pay over, and that is exactly what the Supreme Court says, and the crime was not completed. Consequently the crime that he is now called upon to answer for had no legal existence till after that demand was made. That is an additional reason why we cannot sustain the plea of former acquittal of the crime now charged in this indictment.

We want to assign another reason, speaking now, of course, of the three counts, four, eight and twelve, not of the other ten, and the opsition of this record to-day is this, that there is neither a conviction nor an acquittal. The Supreme Court have set that verdict
190 aside, and therefore I fail to see where there is any record showing a former conviction of any crime charged in these particular counts. It is wiped out as completely as though it never existed, and that, I think, is an additional reason why we cannot hold that this record which is presented to us shows a state of facts which bars a prosecution of the offence charged in the indictment now before us. Of course the clerk will note that this entire record

is before the Court, and also that under the pleadings it appears that the Defendant is the same party named in the other indictment, so that everything that is necessary for him to raise hereafter, which should become necessary, will appear upon the record.

We therefore overrule the plea, sustain the demurrer, or give judgment for the County.

Defendant excepts. Bill sealed.

Mr. BERGER: We now call upon the Defendant to plead to the bill.

The COURT: Here is the bill, and here is the demurrer; see that they go on the record.

Mr. REILLY: We will ask leave to file our plea in this form:

In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

905, Sept. Term, 1905.

COMMONWEALTH
vs.
JOHN T. SHOENER.

And now, September 7, 1905, the Defendant pleads to the above indictment *autrefois acquit*, and avers that he has heretofore been lawfully acquitted of the same offence charged in the above indictment; and for further plea the Defendant pleads the statute of limitations and not guilty.

Mr. BERGER: The plea of former acquittal having been disposed of upon the demurrer, the Commonwealth objects now to the entry of the plea of former acquittal, but contends that the only plea
191 that it is proper now for the defendant to enter is a general plea of guilty or not guilty. The special plea contained in the plea just set forth by the Defendant is *res adjudicata*, having been disposed of on the issue joined by the demurrer of the Commonwealth upon the special plea.

The COURT: We will say this. They can plead the statute of limitations without specially pleading. We have disposed of it. They can plead all of the pleas that they have there, but when we reach the point of disposing of it, then is the time that the question that you suggest will arise. I do not see that they can be prevented from pleading that, but if there is nothing additional presented, I do not know what the plea will avail them. I do not propose to hear more on it except such testimony as may be new.

Mr. REILLY: We want to be perfectly frank with the Court, to have our position understood. The question in our minds was, whether the ruling of your Honor this morning, in sustaining the demurrer and overruling our plea already filed, the plea of *autrefois acquit*, prevents us from offering evidence under that plea. If it does not, there is no necessity for it, because under the 1st Superior decision to which your Honor referred, we shall offer evidence on

this trial to prove that this offence is the same offence. The only question in my mind was whether I ought not to plead that. Of course your Honor can rule upon that.

The COURT: We will dispose of it. Call a jury.

Mr. BERGER: We ask that the jurors be called one at a time on the stand, to be examined on their *voir dire*.

Mr. REILLY: I was just about to make that request.

(Jurors called and examined on their *voir dire*.)

192 (A jury having been selected and sworn, Mr. Farquhar opened case for Commonwealth.)

Commonwealth's Evidence.

Mr. BERGER: We now ask the Defendant whether he will admit his election as Clerk of the Court at the November election of 1899, and his qualification of the duties of the office, and the discharge thereof during the years 1900, 1901, and 1902. I will agree to add to that, that he qualified and that he gave bond with the Safe Deposit Bank as surety.

Mr. REILLY: We will admit that it be taken as proved by the Commonwealth that the Defendant was duly elected Clerk of the Courts of Schuylkill County for the term of three years beginning on the first Monday of January, 1900, and served said term until January 5, 1903, as alleged in the indictment; and that he qualified, gave bond as required by law, with the Safe Deposit Bank as surety, and entered upon and discharged the duties of said office for said term. This admission being made because proof of it was furnished by the Commonwealth at the former trial.

M. J. MULDOON, called and sworn.

Examined by Mr. BERGER:

Q. Where do you live?

A. Shenandoah.

Q. What is your business?

A. Just now not anything, since I left the office.

Q. You were Deputy Controller under H. J. Muldoon, County Controller of Schuylkill County?

A. Yes, sir.

Q. Until the first of January last?

A. Yes, sir.

Q. State whether or not during that time John T. Shoener, acting as Clerk of the Courts of Schuylkill County, filed with you

193 monthly returns in your office of the receipts of his office from liquor license fees and liquor license transfers.

A. Yes, sir.

Mr. BERGER: I have sent for the return, which we propose to identify and offer it to the witness in a moment.

(Witness withdrawn for the present.)

J. E. KANTNER, called and sworn.

Examined by Mr. BERGER:

Q. You live at Cressona?
A. Yes, sir.
Q. You are at present Deputy County Controller?
A. Yes, sir.
Q. Will you kindly produce from the files of your office the monthly statement of Clerk of the Courts John T. Shoener, in his account with the County of Schuylkill for the month ending January 3, 1902, being his last report?
A. 1903.

Mr. REILLY: December 31 you mean.
Mr. BERGER: We will identify the report.
Mr. FARQUHAR: Ending January 3, 1902.
Mr. REILLY: It was filed then.

Q. (Monthly statement produced and shown witness.) When was that statement filed in the County Controller's office?
A. According to the figures on here, I would say it was filed on January 6, 1903.
Q. That has been obtained by you and brought here from the files of the Controller's office?

Mr. BERGER: We offer the report in evidence.

By Mr. REILLY:

Q. You find this paper among the records of the Controller's office?
A. Yes, sir.
Q. And it purports to be, as endorsed, a monthly state-
194 ment of the receipts of John T. Shoener, Clerk of the Court of Quarter Sessions, for the month of December, 1902, does it not?
A. Yes, sir; filed on the 6th of the month.
Q. And filed on the 6th of January, 1903?
A. Yes, sir; the last monthly statement.
Q. Do you find other accounts of Shoener as Clerk of the Court, on file in the office?
A. Yes, sir; we have a statement for each month.
Q. For the years——
A. 1900, 1901 and 1902.
Q. And this statement that we are inquiring about purports to give an account of the license moneys for the year 1901 and 1902, does it not?

Mr. BERGER: Objected to. The statement is the best evidence of what it shows.

A. Yes, sir.

The COURT: I suppose the statement will show what it contains.

Mr. REILLY: The gentleman has been inquiring about it as a statement which was for the month ending January 3, 1903, and offered it. Now I want to show that it is more than that.

The COURT: I suppose if the statement is admitted in evidence it will show what it is.

Mr. BERGER: We object to any cross-examination as to the contents of this statement, this statement itself being identified and being the best evidence.

The COURT: The statement is the evidence.

Q. All you know about it, then, is that you find it among the official papers of the office in your custody?

A. Yes, sir; I was not in the office at the time it was filed.

Mr. REILLY: Make your offer.

Mr. BERGER: That is all for the present.

Mr. REILLY: It is not in evidence. I will ask you to make an offer.

195 Mr. BERGER: I will ask Mr. Muldoon to take the stand.

M. J. MULDOON, recalled.

By Mr. BERGER:

Q. Look at this statement headed, "Monthly statement of receipts of John T. Shoener, Clerk of Quarter Sessions, for the month of December, 1902," filed in the office of the County Controller January 6, 1903. Did you see that statement while you were Deputy County Controller?

A. Yes, sir.

Q. Who filed that statement in your office?

A. Mr. Shoener.

Q. Was he sworn to this statement?

A. Yes, sir.

Q. By you. Sworn as to the truth of the contents thereof?

A. Yes, sir.

Cross-examination.

By Mr. REILLY:

Q. There is a separate paper attached to this monthly statement and fastened by an eyelet?

A. Yes, sir.

Q. Was that with it at the time?

A. Yes, sir.

Q. That is not part of the monthly return that is designated by the endorsement on the back?

Mr. FARQUHAR: We object; whether it is or whether it is not, the paper will show for itself.

The COURT: The paper will show what it is.

Mr. REILLY: I do not want any misunderstanding about it. The gentleman cannot call one paper by one name and produce a paper

that is something entirely different. The monthly statement is a separate and distinct paper, so endorsed on the back of it, but attached to it is another paper, which is the one I suppose our
196 friends are after and want to use. They should not get it in under the guise of a monthly statement.

Mr. FARQUHAR: No, sir; we put it in as a statement of John T. Shoener under oath.

Mr. REILLY: Then why do you object to my inquiring about what this paper is?

Mr. FARQUHAR: Because the paper shows for itself.

Mr. REILLY: I want to know whether that paper was attached to the monthly return.

Mr. FARQUHAR: That we have no objection to.

(Last question repeated.)

Mr. FARQUHAR: That we object to.

(Objection sustained.)

By Mr. BERGER:

Q. Will you look through these files and get the two previous annual statements filed in your office by John T. Shoener as Clerk of the Court?

A. For October and November?

Q. No, sir, the two previous years.

The COURT: Let us understand where we are at about this one. Is it in evidence?

Mr REILLY: No, sir, not yet.

The COURT: If any further examination is necessary, I have nothing to say, but if you have done with that examination, you better dispose of it, unless you want to make an offer of all.

Mr. BERGER: I will offer this one. We now desire to offer statement headed, "Monthly statement of receipts of John T. Shoener, Clerk of Quarter Sessions for the month of December, 1902, filed in the office of the County Controller January 6, 1903."

Mr. REILLY: For what purpose?

Mr. BERGER: This for the purpose of showing that John T. Shoener, as Clerk of the Courts of the County of Schuylkill, received in his official capacity as such Clerk of the Court of Quarter
197 Sessions of the County of Schuylkill, certain license fees arising from applications filed for liquor licenses, and upon applications for the transfer of liquor licenses, during the years 1900, 1901 and 1902; that he received and held for judicial determination during the year 1901 the sum appearing in this statement, $5380; that he received in the year 1901 the sum of $1075, from liquor license transfers, which sum was held for judicial determination; that he received during the year 1902 the sum of $5490 from license applications, which sum was held for judicial determination; that he received for transfers in the year 1902 the sum of $700; that he received during the year 1902 for license applications, the licenses of which were to be granted in 1903, the sum of $5595; that he received during his term as Clerk of the Court of Quarter Sessions, the

total sum of $18,240, being the receipts as Clerk of the Court arising from license fees upon applications and transfers, and that the record shows that he held these moneys for judicial determination. This to be followed by evidence showing that the issue was joined; that judicial determination thereof was had, which judicial determination was against the Defendant. This to be followed by evidence that subsequent to the judicial determination of this question, adjudging these moneys to belong to the County of Schuylkill, legal demand for the payment to the County of Schuylkill of these moneys, or a part thereof, was made by F. J. Noonan, the County Treasurer, on the 30th day of June, 1905, he being the proper officer authorized to demand and receive the same. We offer the statement for this purpose.

Mr. REILLY: It is objected to as incompetent, immaterial and irrelevant, because, first, the offer does not propose to show that the moneys alleged in the indictment, to wit, $7,243.28 which the Defendant is charged with having failed to pay over, are any
198 part and parcel of the moneys referred to in the statement offered in evidence, and is therefore immaterial and irrelevant. Second, because the statement shows the receipt of the money by the Defendant more than two years prior to the finding of the indictment under which he is now being tried, and does not propose to show that any demand for the payment of the same was made within two years after the receipt of the money by him, as proposed to be shown in the offer, and is therefore barred by the statute of limitations, and the evidence is incompetent, immaterial and irrelevant.

The COURT: We will admit the evidence and give the Defendant a bill. We have already expressed our views on the subject of limitation.

Defendant excepts. Bill sealed.

Mr. REILLY: That first part of the objection I think would be well taken, that their offer does not state that these moneys in the present indictment are part of the moneys included in this offer.

The COURT: If the Commonwealth does not establish the moneys they seek to recover, or that they prosecute the Defendant for, are the moneys of the County, then we will dispose of it when we get to the end of the case. There is nothing that I know of, that requires them to prove everything at once.

Mr. REILLY: Their offer should state that, otherwise the evidence would be irrelevant.

Mr. BERGER (reading): "December, 1902. John T. Shoener, Clerk of the Courts in account with the County of Schuylkill, for the month ending January 3, 1902. To license moneys held for judicial determination, 1901, $5,380; to license moneys held for judicial determination, transfers, 1901, $1,075; to license money held for judicial determination, 1902, $5,490; to license money held for judicial determination, transfers, 1902, $700; to license moneys held for judicial determination, 1903, $5,595; total moneys held for judicial determination, $18,240."

199 Mr. REILLY: You should read the whole paper, I think.

Mr. BERGER: We think not. This is all that appears from this record that is pertinent to this issue.

By Mr. REILLY:

Q. That paper is the regular form of the monthly returns required by law to be made by a public official?

A. Yes, sir.

Q. And contains a full statement of the receipts of Mr. Shoener's office for the month of December, 1902?

Mr. FARQUHAR: We object to that; whether it contains the full statement or not would be shown by the paper itself, and it may or may not be. It is his return of what he received.

Q. And attached to that paper is another paper, in typewriting?

A. Yes, sir.

Q. Which purports to give a statement of the moneys that he received for fees from license applications?

A. Yes, sir; and transfers.

Q. Had Mr. Shoener made prior returns to the Controller's office, showing the liquor license fees?

A. Yes, sir.

Q. Had he made them separately and for each of the years?

A. He had made them all, I think, if my recollection is right, about the same as this.

Q. That purports to be a summary of the different years?

A. Yes, sir; they were all made out in the same order as this.

Q. Did he not make a separate return each year?

A. Each month.

Q. And also each year, for the license money?

A. At the end of the year he made just the same as this.

200 This is the last statement of the year, and he gave an account of all the license money held.

Q. Did he not make a return for 1901?

A. Yes, sir.

Q. And for 1902?

A. Yes, sir.

Q. Does that one in 1903 include the two former?

A. That is for 1902, the last one.

Q. But filed January 6, 1903?

A. Yes, sir.

Q. And includes the three years?

A. Yes, sir.

Q. Where are those separate returns?

A. Right here.

Mr. BERGER: We will agree that they shall be offered to show how the total was made up. We will ask the witness to identify the statement filed in the two previous years by the same Defendant.

A. Yes, sir. (Producing paper.)

By Mr. BERGER:

Q. The one identified is endorsed "Monthly statement of receipts

of John T. Shoener, Clerk of the Quarter Sessions, for the month of December, 1901, filed in the office of the County Controller on December 31, 1901." Signed, H. J. Muldoon, Controller. Was that filed in your office?

A. Yes, sir.

Q. Was the typewritten statement relating to license fees attached at the time of filing, as it is here attached?

A. Yes, sir.

Mr. REILLY: What amount does that show?

The COURT: For what month?

A. For 1901. This is for 1900, ending December 31, 1901. It is for 1900.

Mr. MOYER: When was it filed?

A. December 31, 1901.

201 Q. I show to you statement filed by John T. Shoener, Clerk of the Court—— .

The COURT: December? Wait till we get that in shape.

Mr. BERGER: It was filed December 31, 1901.

The COURT: Then he says it is for 1900.

A. 1901; that is right.

By the COURT:

Q. What year is it for?

A. It is for 1901, that is.

By Mr. BERGER:

Q. That is for 1901?

A. Yes, sir.

The COURT: What date in December was it filed?

Mr. BERGER: December 31, 1901.

The COURT: And for the year 1901?

Mr. BERGER: Yes.

Mr. REILLY: Headed "For the month ending December 31, 1901."

Q. (Statement of December 31, 1900, shown witness.) Was that statement filed in your office by John T. Shoener?

A. Yes, sir.

By the COURT:

Q. Filed when?

A. December 31, 1900.

Q. And for the year 1900?

A. Yes, sir.

Mr. BERGER: We now offer both of these statements in evidence, for the purpose before stated, and to show how the balance made up in the last statement previously offered was made up from the different years' receipts.

Mr. REILLY: Defendant makes the same objection as to
202 the former offer, and asks for an exception and a bill sealed.

Defendant excepts. Bill sealed.

(Statements marked "Ex. 1, 9-7-05, H. C. W.," "Ex. 2, 9-7-05, H. C. W.," and "Ex. 3, 9-7-05, H. C W.")

SAMUEL J. DEIBERT, called and sworn.

Examined by Mr. BERGER:

Q. What is your position?
A. Deputy Prothonotary.
Q. How long have you acted in that position?
A. Five years and a half; two and a half under Mr. Leib, and during Mr. Gore's term.
Q. Have you with you, produced from your office, the record to No. 61, January Term, 1902, the case of the County of Schuylkill *vs.* John T. Shoener?
A. Yes, sir. (Producing papers.)
Q. Is that the record?
A. Yes, sir; that is the record as it was made up to the Supreme Court and returned.
Q. Includes all the proceedings?
A. Yes, sir; as far as I know at that time.

Mr. BERGER: We now offer this record, for the purpose of showing that the title to these license moneys was in dispute; that the question as to whom they belonged was agreed to be determined upon a case stated; that it was determined in the case stated that the title to the said moneys was in the County of Schuylkill, from which determination an appeal was taken to the Supreme Court by the defendant, John T. Shoener, and that the judgment of the Court below was sustained, that the title to these moneys was in the County of Schuylkill. This to be followed by evidence showing that subsequent to this determination demand was made for the payment of these moneys, by the County Treasurer, on the 30th of June, 1905, or a part of them, and that the Defendant failed to pay the same over.

Mr. REILLY: The offer does not state when that determina-
203 tion was made, as I think it should.

Mr. BERGER: We will offer the record to show that.

The COURT: The record will speak for itself.

Mr. REILLY: It is objected to, because it is immaterial, incompetent and irrelevant in this issue, and the offer does not propose to show that any demand was made upon the Defendant to pay over any such moneys within two years from the time of such determination, or from the receipt of the moneys by the defendant.

The COURT: For the reason we have before given, we will overrule the objection and admit the evidence and seal a bill for Defendant.

Defendant excepts. Bill sealed.

Mr. BERGER: We now offer the record in evidence for the purpose stated. No. 61, January Term, 1902. C. P. Schuylkill, No. 6, January Term, 1903. Supreme Court. The County of Schuylkill *vs.* John T. Shoener, Appellant. Certiorari to the Court of Com-

mon Pleas for the County of Schuylkill. Returnable the third Monday of February, 1903. Rule on the appellee to appear and plead on the return day of the writ. Filed Jan'y 9, 1903. Filed Feb. 13, 1903, in Supreme Court. Endorsed, Wm. Wilhelm, S. B. Edwards.

Mr. REILLY: Do you want to put that whole record in evidence?

Mr. BERGER: We offer the whole record; we do not think it is necessary to read the whole record at this time.

Mr. REILLY: To typewrite it?

Mr. BERGER: We shall agree that this record shall appear at large on the notes, and that the stenographer shall write it out in full as it appears of record.

204 Mr. RIELLY: That is what we want to avoid. We want to avoid the expense of making such a big, voluminous record. Read the judgment of this court and the Supreme Court.

The COURT: That may be all that may be referred to, but they have no right to offer in evidence a portion of the record in order to make their offer. If they did it, it would be objectionable, and in order to make their offer legal they must offer the record.

Mr. MOYER: We would waive that objection.

The COURT: We will leave it stand—the record is offered in evidence—and determine hereafter.

Mr. REILLY: You have not given us the date.

Mr. BERGER: The record will speak for itself.

By Mr. WILHELM:

Q. When did you receive that record from the Supreme Court?

A. May 12, 1903, it is marked filed on the remittitur.

(Record marked "Ex. No. 4, 9-7-05, H. C. W.")

C. E. DEPEW, called and sworn.

Examined by Mr. BERGER:

Q. You are at present Deputy County Treasurer?

A. Yes, sir.

Q. When did you assume that position?

A. January 5, 1903.

Q. Have you here the record of your office showing the payments that were made into your office, since you are in office, by John T. Shoener, on account of liquor license applications?

A. Yes, sir.

Q. Will you produce the record?

(Book produced by witness.)

205 Q. Just refer to the account headed "Treasurer, in account with the County of Schuylkill," &c., showing the first payment made by John T. Shoener during your term of office, into the County treasury.

A. On January 6, 1903.

Q. I mean since you are in office. January 6th?

A. Yes, sir.

Q. How much was that?
A. $24.10.
Q. What was that for?
A. Miscellaneous receipts for October, November and December, 1902.
Q. What was the next payment?
A. January 30, 1903.
Q. What book are you reading from, for the purpose of identification?
A. This is our record with all the——
Q. Your regular ledger?
A. Regular ledger with all the County officials.
Q. Ledger containing the accounts with the County officials?
A. Yes, sir.
Q. And you are now reading from the account with John T. Shoener?
A. Yes, sir.
Q. As Clerk of the Courts of the County of Schuylkill?
A. Yes, sir.
Q. In his official account with the Treasurer?
A. Yes, sir.
Q. What was that payment made January 30, 1904?
A. 1903. January 30, 1903. The office fees for October, November and December, 1902, amounting to $1225.35.
Q. Will you kindly get to the payments on account of the liquor licenses?

206 By the COURT:

Q. What is that twelve hundred; is that the total payments, of what?
A. October, November and December, 1902.
Q. Then that is not the total payments?
A. Total payments into our office?

Mr. FARQUHAR: We can eliminate those, I think. He paid into the office all of his receipts excepting liquor licenses. We do not want those. We have asked him to give the payments on account of those liquor licenses.
Mr. BERGER: That is all we propose to prove.
Mr. MOYER: He is giving miscellaneous revenue.
The COURT: That ought to be stricken out.
Mr. BERGER: We ask that it be stricken from the record.
The COURT: Yes, sir.

By Mr. BERGER:

Q. So that there may be no misunderstanding, kindly refer to the first payment made upon the account of John T. Shoener into your office on the judgment debt to No. 61, January Term, 1902.
A. On January 30, 1904, paid $1,436.35.
Q. On what account?
A. On account of judgment debt 61 January Term, 1902.

The COURT: What was that?
Mr. FARQUHAR: The suit brought for the license money.

A. On January 30, 1904, on account of judgment debt 61 January Term, 1902, $1,436.35.
Q. Is that the whole payment on that?
A. On that date.

Mr. REILLY: I think I will have to ask the gentleman for an offer. I do not know what they are getting at here.
207 Mr. FARQUHAR: We are attempting to prove the payments made by John T. Shoener on account of the license moneys which he had withheld, amounting to some eleven thousand dollars, and leaving the balance of $7,243.28, which we allege we made a demand for on the 30th of June, 1905, and which he has failed to pay over.
The COURT: Let him proceed now to give us the amount paid by the Defendant for license money and the amount paid by the Defendant for transfer of licenses, if they are separately kept. If they are kept together, then go on and give them together, and give us the total when he gets to the end of it, but leave out all the other payments.
Mr. BERGER: This payment on judgment No. 61, January Term, was the judgment previously offered in evidence.
The COURT: Wherein it was determined it belonged to the County?
Mr. BERGER: Yes, sir; and it was the first payment on that account.

Q. When was the next payment made on account of judgment 61 January Term?

Mr. REILLY: That I object to. That is what prompted my objection. I ask for an offer.
Mr. BERGER: The offer is on record.
Mr. REILLY: It is not in regular form. We want an offer and have a right to object to it.
(Statement of Mr. Farquhar read.)
Mr. REILLY: That is all right, if they confine their proof to that offer, but they are introducing evidence about payments on another judgment.
The COURT: A judgment in which the County of Schuylkill won against Shoener, the case stated, in which it was determined that he owed that money, and that was exclusively for licenses. Certainly that would be proper.

208 Q. What was the next payment made by Shoener and on what account?
A. On February 1, 1904, on account of judgment debt 61 January Term, 1902, $3,900.
Q. When was the next payment made by Shoener, and on what account?
A. On February 3, 1904, fees, Act of 1897, application for liquor license transfers for license, 1901, $1,075.

Q. Read that statement again, and what account it was entered on.
A. Fees according to Act of 1897, application——
Q. Fees received, is it not?
A. Yes, fees received on account of fees for Act of 1897, application transfers of liquor licenses for 1901, $1,075.

By the COURT:

Q. That is February 3d that was paid?
A. Yes, sir.

By Mr. BERGER:

Q. What was the next payment made by Shoener, and on what account?
A. On the same date, February 3, 1904, on account of judgment debt 61 January Term, 1902, $43.65.
Q. What was the next payment made by Shoener, and on what account?
A. On the same date, February 3, 1904, fees, Act of 1897, application transfers for liquor licenses for 1902, $705. Those three payments are on the same date.
Q. What was the next payment made by Shoener, and on what account?
A. February 5, 1904, fees for 1901, filing applications for wholesale and retail liquor licenses, from February 1, 1902, to February 1, 1903, $1,051.35.
Q. When was the next payment made by Shoener, and on what account?
A. February 9, 1904, part payment of fees received 1901
209 for filing applications for liquor licenses, February 1, 1902, to February 1, 1903, $2,690.02.
Q. What was the next payment made by Shoener and on what account?
A. March 7, 1904, part payment of fees received 1901 for filing applications for wholesale and retail liquor licenses, $100.35.
Q. You may state what the total amount paid by Shoener was, paid on account of liquor license fees and transfers of liquor license fees.
A. Those amounts I just gave you?
Q. Yes; just total them.

Mr. REILLY: That would include the amounts paid on the judgment too?
Mr. BERGER: Certainly.
The COURT: As I understand, all the payments made on the judgment are so specified?
Mr. BERGER: Yes, sir.
Mr. FARQUHAR: I think the judgment was paid in full.

Q. What is the total amount paid on account of liquor license fees and liquor license transfers?
A. $11,001.72.
Q. You may state whether or not there were any other payments

made by John T. Shoener on account of liquor license applications or on account of liquor license transfers.

A. No, sir; no other payments.

Cross-examination.

By Mr. REILLY:

Q. What book do you say that this is that you are reading from?

A. This is our ledger account with all the different County officials.

Q. It is labelled "Treasurer in account with Schuylkill County officers"?

A. Yes, sir.

Q. And you were reading from page 158 of that book?

210 A. Yes, sir.

Q. Does that account, as it appears on that page in this book, purport to cover and include the account of John T. Shoener as Clerk of the Court during his entire term of three years?

A. February 1, 1900. He was only Clerk for one term, was he not?

Q. Yes, sir.

By the COURT:

Q. That is from February 1, 1900?

A. That is the first time he paid any money in. It is for the full term of John T. Shoener, beginning 1900.

Q. Full account with John T. Shoener?

A. Yes, sir.

By Mr. REILLY:

Q. Where does the account begin?

A. Page 154.

Q. Are there other credits in his account on the liquor license money?

A. Only what appears in the book.

Q. I say, are there other credits in his account, other than those you have read, of liquor licenses?

A. I did not go over the records. This is only the record from the time we came in the office, since I have been in the office.

Q. That is your own record?

A. Yes, sir.

Q. But that is the official record belonging to the Treasurer's office?

A. Yes, sir.

Q. Just state whether that book, in the account you have there with John T. Shoener, shows that there were any other credits allowed him for payment for money on liquor license fees.

Mr. BERGER: We submit that this would be immaterial if it was prior to the time of the filing of the last annual statement on

211 January 6, 1903, by the Defendant, admitting having possession of $18,240 of money held for judicial determination.

The COURT: That would be proper to ask, whether there

were any other moneys paid by him for license fees, for the purpose of showing whether this is the whole or not.

Mr. BERGER: But it should be limited to the time when the Defendant, by his sworn statement, admitted having in his possession the sum of $18,240.

The COURT: The payment should be limited to that time?

Mr. BERGER: Certainly.

The COURT: If he made any payments after that.

Mr. BERGER: But if he made payments before, it would have no bearing upon the record, because on the 6th of January, 1903——

The COURT: I do not understand Mr. Reilly to claim that statement is wrong in the amount named by him, as there is no such question as that arises here, as to whether or not he had paid any money before he made that statement, which he failed to take credit for in that statement, and therefore I do not think he is trying to——

Mr. REILLY: No. The Commonwealth purports to allege that this amount they claim is a balance of that account of eighteen thousand dollars. We have a right to show whether that is correct or not.

The COURT: They claim the balance to be seven thousand and something.

Mr. REILLY: If we can show that is not the correct amount, we have a right to do it.

The COURT: Yes, I think you would have that right, if there is any mistake upon his part in fixing the amount.

212 A. This book does not mention any receipts for licenses for the year 1900, 1901 or 1902; just says office earnings or office receipts for the different months.

(Recess until two o'clock, P. M.)

2:00 P. M.

C. E. DEPEW resumes stand.

By Mr. REILLY:

Q. Will you just refer to your account? What is that (indicating)?

A. Balance transferred to County.

Q. What balance is that?

A. It is a balance remaining to his credit at the end of his term.

Q. Does this account with Shoener show any debit against him of the moneys that he received for license fees or any other fees?

A. No, sir.

Q. The account then is simply a credit account, that is, your book would simply show the credits to which Shoener was entitled for moneys paid into the County Treasury?

A. Yes, sir.

Q. And the payments that you have mentioned, the first as showing any payment or credit on the license money was what date?

A. On January 30, 1904.

Q. And what amount was that?

A. $1,436.35.

Q. Can you say whether that was a cash payment or in what way the credit was given or allowed?

A. I think there were warrants transferred, but I am not positive now.

Q. That is, warrants drawn by the Commissioners on the County Treasurer in favor of Shoener?

213 Mr. FARQUHAR: The warrants themselves would be the best evidence of that.

A. We have all the warrants.

Q. There would be a warrant, then, on file in the Commissioner's office and in the Controller's office, for each item of credit in this account?

A. Yes, sir; here is all his credits. The warrant numbers are right there, all the way down. I cannot recall whether there was a check or a warrant.

Q. That is, you mean you cannot recall whether it was a check or checks, or a warrant in his favor. Is that what you mean?

A. Yes. It was no check of Shoener's, I am positive of that, but it may have been a warrant.

Q. In his favor. And how about the other items? Take the next item. When is that?

A. February 1.

Q. And what amount?

A. $3,900.

Q. Can you say what makes that credit?

A. No, I do not recall.

Q. Upon what basis did you make those two entries of credit to judgment No. 61, January Term, 1902?

A. I do not know if it was a receipt or a warrant or a check that we received and gave him a receipt for it, and that is the reason the entry was made.

Q. But how *you came* to credit it to that judgment?

A. We had a letter, I think, from Mr. Reed. Charley Reed made the settlement.

Q. Charley Reed made the settlement?

A. I think he did. Yes, he did, and he had a letter, and on the receipt he wanted it written that way.

Q. Who is Charley Reed?

A. Works for Mr. Kaercher.

Q. For Attorney S. H. Kaercher?

214 A. Yes, sir.

Q. Who is Mr. Kaercher; what connection has he with this account?

A. Nothing that I know of. I do not know who he is representing.

Q. Do you know whether he was attorney for the Controller?

A. He was attorney for the Controller, I know, yes, sir.

Q. When you were asked to show what credits Shoener was entitled to for moneys paid on account of the license fees, why did you

mention that item, when your book shows, the entry shows, that it is a credit to a particular judgment, particular number and term?

A. I was asked what credits I had for Shoener, and this is given.

Q. You were answering the general question as to the credits that the book showed Shoener was entitled to?

A. Yes, sir.

Q. But whether that credit ought to go to his license fees or not you do not know, from anything the book shows?

Mr. BERGER: We object to that. The question is stated on a fact which is not in evidence. What this witness did was to read from his book showing the application of the particular amount to the judgment, to No. 61 January Term.

Mr. REILLY: You are claiming, as I understand, that that is a credit to be allowed on the eighteen thousand dollars license fees.

Mr. BERGER: We claim that from the evidence offered here, not from what he said. He is cross-examining him upon the hypothesis that he answered that that money was to be credited or came from license applications. As a matter of fact, the money was paid into the treasury, as the record shows and as he testified, on ac-
215 count of the judgment to No. 61 January Term. The objection of the Commonwealth is that the cross-examination is improper, for the reason that Mr. Reilly assumes that this witness testified that that entry was applicable to liquor license fees, whereas he simply read from the record, which showed that it was applied to the judgment to No. 61 January Term, which is of record here; and whether this is applicable to license fees or not must be ascertained from the judgment or the record that has been offered here, instead of from the cross-examination of this witness.

The COURT: The book will speak for itself.

A. I can recall now that this money was paid in cash; I am positive of that.

By the COURT:

Q. What money are you speaking of now?

A. All these accounts here, this $1,436.35 and all these other accounts I gave this morning.

Q. All that you gave this morning?

A. Yes, sir.

Q. Paid in cash?

A. Paid in cash.

By Mr. REILLY:

Q. Did Mr. Reed bring the cash?

A. I think he did.

Mr. FARQUHAR: I cannot understand the materiality of this cross-examination. We have given them credit here for these amounts. Do they claim we have not given them credit for anything? How is it material, so long as the County have given them credit, how it was paid, whether in gold or in notes or how it was paid. The question is the amount. We take it to be perfectly immaterial whether it

was paid in warrants or money or how it was. It was, in fact, paid in money.

Mr. BERGER: And so testified to; but the record is the best evidence, and the cross-examination is improper.

216 Q. What is the last item of credit there or entry in that account?

A. March 7, 1904, part payment of fees received in 1901 for filing applications for wholesale and retail liquor licenses, $100.35.

Q. Do you know what that represents, cash or a warrant?

A. Cash.

The COURT: He says it all represents.

Q. All of these items?

A. All of these items were cash.

Q. And is that account footed up or closed?

A. As far as our book is concerned, yes, sir.

Q. When.

A. On January 2, 1905, the balance was transferred to the County, $766.97.

Q. You mean that much cash was transferred to the County, or a credit given to the County?

A. A credit given to the County.

Q. And that was a balance then in Shoener's favor?

A. Yes, sir.

Q. On that date, January 2, 1904?

A. Yes, sir.

Q. $766.97?

A. January 2, 1905.

By Mr. BERGER:

Q. The account produced by you only shows the moneys paid by the Clerk of the Court into the County treasury, does it not?

A. Yes, sir.

Q. State whether or not warrants were drawn in favor of the Defendant, for and on his behalf, as against that account.

A. Yes, sir.

Q. Where are those warrants?

A. I have them down in the office.

Q. Will you kindly produce them?

217 A. Yes, sir. (Warrants produced by witness.)

By Mr. FARQUHAR:

Q. You stated, in reply to Mr. Reilly, that that book showed a credit of Mr. Shoener's of something over seven hundred dollars?

A. $766.97.

Q. Do you mean to say that that shows a credit to him, that the County owed him that?

A. Yes, sir.

Q. What did it owe him that for?

A. On account of these payments on account of judgment debt.

Q. Does it not merely show that he had paid in that amount more than the county had paid out for expenses?
A. Yes, sir.
Q. That is all it meant?
A. Yes, sir; that is all.
Q. Is not that account that you have got there an account between the Treasurer and the County, showing what the Treasurer had received on account of the County from Mr. Shoener?
A. Yes, sir.
Q. And what the Treasurer had paid out on account of Mr. Shoener's office?
A. Yes, sir.
Q. Is not that all it is?
A. That is all.
Q. And all it shows is that Mr. Shoener had paid in $766 more than the County had paid out for the expenses of his office?
A. Yes, sir.

By Mr. BERGER:

Q. (Warrant No. 4140 shown witness.) Look at that warrant. Where did you get that,—$2,669.02?
A. Charles G. Reed brought it in our office, money paid to him.

Mr. BERGER: We offer this warrant in evidence. County of Schuylkill. Court House account. Pottsville, February 5, 1904. No. 4140. Amount, $2,669.02. County Treasurer pay to John T. Shoener, $2,669.02, for balance salary for 1900, 1901 and 1902. Approved and countersigned, M. J. Muldoon, County Controller. Charge appropriation E, 1904, item 1. Signed by the County Commissioners, F. R. Kantner, Horace F. Reber, George Opie. Entered in the office of the County Con roller, No. 370. Endorsed, John T. Shoener and Charles G. Reed.

218

Q. Was that endorsement of John T. Shoener on that warrant when you received it?
A. It was.
Q. Is it in his signature and proper handwriting?
A. I think it is, but I am not positive.

Mr. BERGER: Warrant No. 4015 offered. County of Schuylkill, Court House account. Pottsville, Pa., January 30, 1904. $900. Pay to John T. Shoener, for Isaac Morgan, or order, $900, for salary for the year 1902. Approved and countersigned, M. J. Muldoon, and charge appropriation E, 1904, item 3. Entered in office of County Controller No. 170, and signed by the County Commissioners.

Q. That warrant is endorsed how?
A. John T. Shoener, for Isaac Morgan; Charles G. Reed.
Q. The money was paid out?
A. Yes, sir.
Q. Received credit on the account for the $2,669 just produced and for this?

A. Yes, sir.

Mr. BERGER: Warrant No. 4014. $900. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to John T. Shoener, for Isaac Morgan, or order, $900, for salary for the year 1901. Approved and countersigned, M. J. Muldoon, County Controller. Charge to appropriation E, 1904, item 3. Signed by the three Commissioners.

219 Q. How is that endorsed?
A. John T. Shoener, for Isaac Morgans; Charles G. Reed.
Q. That money was paid out?
A. It was.

Mr. BERGER: Warrant No. 4013. $150. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to John T. Shoener, for Isaac Morgan or order, $150, for salary for November and December, 1900. Approved and countersigned, M. J. Muldoon, County Controller. Charge appropriation E, 1904, item 3. Signed by the County Commissioners. Entered in office of County Controller No. 168.

Q. How is that endorsed?
A. John T. Shoener, for Isaac Morgans; Charles G. Reed.
Q. That money was paid out?
A. It was.

Mr. BERGER: Warrant No. 4084. $250. County of Schuylkill. Court House account. Pottsville, February 1, 1904. County Treasurer pay to John T. Shoener, for John T. Duffy, or order, $250, for salary for November and December, 1900, and charge appropriation E, 1904, item 2. Approved and countersigned, M. J. Muldoon. Entered in the office of the County Controller. Signed by the three Commissioners.

Q. How is that endorsed?
A. John T. Shoener, for John J. Duffy; Charles G. Reed.
Q. That money was paid out?
A. It was.

Mr. BERGER: Warrant No. 4085. $1500. County of Schuylkill. Court House account. Pottsville, Pa., February 1, 1904. County Treasurer pay to John T. Shoener, for John J. Duffy, or order, $1500, for salary for the year 1901, and charge appropriation E, 1904, item 2. Approved and countersigned by M. J. Mul-
220 doon, County Controller. Entered in the office of the Controller, No. 287. Signed by the Commissioners.

Q. How is that endorsed?
A. John T. Shoener, for John J. Duffy; Charles G. Reed.
Q. That money was paid out?
A. Yes, sir.

Mr. BERGER: Warrant No. 4086. $1125. County of Schuylkill. Court House account. County Treasurer pay to John T. Shoener, for John J. Duffy, or order, $1125, for salary for nine months for

the year 1902, and charge appropriation E, 1904, item 2. Approved and countersigned, M. J. Muldoon, County Controller. Signed by the County Commissioners. Entered in office of County Controller, No. 288.

Q. How is that endorsed?

A. John T. Shoener, for John J. Duffy; Charles G. Reed.

Mr. BERGER: Warrant for $375. County of Schuylkill. Court House account. No. 4435. County Treasurer pay to John Duffy $375, for three months' salary, balance for 1902, and charge appropriation E, 1904, item 2. Signed by Horace F. Reber and George Opie, County Commissioners. Approved and countersigned, M. J. Muldoon, Controller. Entered in office of County Controller No. 815.

Q. How is that endorsed?

A. John Duffy; John J. Duffy; Charles G. Reed.

Q. That money was paid out of the County Treasury?

A. Yes, sir.

Mr. BERGER: Warrant No. 4018. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. $900. County Treasurer pay to Walter D. Shoener, or order, $900, for salary for the year, 1902, and charge appropriation E, 1904, item 4. Approved and countersigned, M. J. Muldoon. Entered in the
221 office of County Controller, No. 173. Signed by the County Commissioners.

Q. How was that endorsed?

A. Walter D. Shoener; Charles G. Reed.

Mr. BERGER: Warrant No. 4017. $900. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to Walter D. Shoener, or order, $900, for salary for the year 1901, and charge appropriation E, 1904, item 4. Approved and countersigned, M. J. Muldoon, County Controller. Entered in office of County Controller. Signed by the County Commissioners.

Q. How is that endorsed?

A. Walter D. Shoener; Charles G. Reed.

Mr. BERGER: Warrant 4016. $150. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to Walter D. Shoener $150, for salary for November and December, 1900, and charge appropriation E, 1904, item 4. Approved and countersigned by the Controller, M. J. Muldoon. Entered in office of Controller, No. 171. Signed by the County Commissioners.

Q. How is that endorsed?

A. Endorsed, Walter D. Shoener; Charles G. Reed.

Mr. BERGER: Warrant for $36.80. County of Schuylkill. Court House account. Pottsville, Pa., February 2, 1904. No. 4107. County Treasurer pay to Gus Samuel or order, $36.80, for advertising liquor license transfers for 1900. Approved and countersigned, M. J. Muldoon, County Controller. Entered in office of County Controller, No. 292. Signed by the County Commissioners.

Q. Endorsed?

A. Gus Samuels; Charles G. Reed.

Mr. BERGER: Warrant No. 4118. $35. County of Schuylkill. Court House account. Pottsville, Pa., February 3, 1904.
222 County Treasurer pay to Rausch & Irish, or order, $35, for application blanks, &c. Approved and countersigned. Charge appropriation E, 1904, item 5. Approved by the County Controller. Entered in office of County Controller. No. 293. Signed by the Commissioners.

Q. Endorsed?

A. Rausch & Irish; Charles G. Reed.

Mr. BERGER: $46.50. No. 4106. County of Schuylkill. Court House account. Pottsville, Pa., February 2, 1904. County Treasurer pay to Chronicle Publishing Company, or order, $46.50, for supplies, and charge appropriation E, 1904, item 5. Signed by the County Commissioners. Approved and countersigned, M. J. Muldoon, County Controller. Entered in office of County Controller, No. 291.

Q. Endorsed?

A. Chronicle Publishing Company, C. K. Schwarr, Manager; Charles G. Reed.

Mr. BERGER: $187.35. No. 4119. County of Schuylkill. Court House account. Pottsville, Pa., February 3, 1904. County Treasurer pay to Daily Record Publishing Company, or order, $187.35, for advertising liquor license applications for 1902. Approved and countersigned, M. J. Muldoon, County Controller. Entered in office of Controller, No. 333. Charge appropriation E, 1904, item 6. Signed by the County Commissioners.

Q. Endorsed?

A. Daily Record Publishing Company, T. C. O'Connor, Manager. Pay any bank or banker. Pay to any national or state bank or order. Union National Bank of Mahanoy City, E. S. Reinhold, Cashier. Received payment, J. W. Fox, Treasurer.

Mr. REILLY: Those that are not endorsed by Charles G. Reed just keep separate.

Mr. BERGER: $299.55. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. No. 4009. County Treasurer pay to the Daily Republican, or order, $295.55, for advertising liquor license applications and transfers for 1902, and
223 charge appropriation EE, 1904, items 6 and 7. Signed by the County Commissioners. Approved and countersigned, M. J. Muldoon, Controller. Entered in office of County Controller, No. 164.

Q. Endorsed?

A. J. H. Zerbey, Proprietor, Daily Republican; Charles G. Reed.

Mr. BERGER: $307.65. No. 4008. County of Schuylkill. Court House account. Pottsville, January 30, 1904. County Treasurer pay to The Daily Republican, or order, $307.65, for advertising liquor license applications and transfers for 1901, and charge appropriation EE, 1904, items 6 and 7. Signed by the Commissioners. Approved and countersigned by Muldoon, Controller, No. 163.

Q. Endorsed?

A. J. H. Zerbey, Proprietor, Daily Republican; Charles G. Reed.

Mr. BERGER: $272.40. No. 4007. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to the Daily Republican, or order, $272.40, for advertising liquor license applications and transfers for the year 1900, and charge appropriation EE, 1904, items 6 and 7. Signed by the County Commissioners. Approved and countersigned, M. J. Muldoon. Entered in office of County Controller, No. 161.

Q. Endorsed?

A. J. H. Zerbey, Proprietor, Daily Republican; Charles G. Reed.

Mr. BERGER: $26.95. No. 4006. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to The Daily Republican, or order, $26.95, for printed matter furnished during 1902, and charge appropriation E, 1904, item 5. Approved and countersigned, M. J. Muldoon, County
224 Controller. Entered in the Controller's office, No. 161. Signed by the County Commissioners.

Q. Endorsed?

A. J. H. Zerbey, Proprietor, Daily Republican; Charles G. Reed.

Mr. BERGER: $16.85. No. 4005. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to the Daily Republican, or order, $16.85, for printed matter furnished during 1901, and charge appropriation E, 1904, item 5. Approved and countersigned, M. J. Muldoon, County Controller. Entered in office of Controller No. 160. Signed by the County Commissioners.

Q. Endorsed?

A. J. H. Zerbey, Proprietor, Daily Republican; Charles G. Reed.

Mr. BERGER: $42. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer, pay to The Daily Republican, or order, $42, for printed matter furnished during 1900, and charge appropriation E, 1904, item 5. Approved and countersigned, M. J. Muldoon, County Controller. Entered in office of County Controller, No. 159. Signed by the Commissioners, No. 4004.

Q. Endorsed?

A. J. H. Zerbey, Proprietor, Daily Republican; Charles G. Reed.

Mr. BERGER: $293.75. No. 4003. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to Straughn, Parrott & Company, or order, $293.75, for advertising liquor license applications and transfers for 1902, and charge appropriation EE, 1904, items 6 and 7. Approved and countersigned, M. J. Muldoon, County Controller. Entered in office of County Controller, No. 158. Signed by the Commissioners.

Q. Endorsed?

225 A. Straughn, Parrott & Company, per C. T. Straughn; Charles G. Reed.

Mr. BERGER: $313.60. No. 4002. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to Straughn, Parrott & Company, or order. $313.60, for advertising liquor license applications and transfers for 1901, and

charge appropriation EE, 1904, items 6 and 7. Signed by the County Commissioners. Approved and countersigned by M. J. Muldoon, County Controller, No. 157.

Q. Endorsed?

A. Straughn, Parrott & Company, per C. T. Straughn; Charles G. Reed.

Mr. BERGER: $190.05. County of Schuylkill. Court House account. No. 4001. Pottsville, Pa., January 30, 1904. County Treasurer pay to Straughn, Parrott & Company, or order, $190.05, for advertising liquor license applications for 1900, and charge appropriation E, 1904, item 6. Signed by the County Commissioners. Approved by M. J. Muldoon, County Controller, No. 156.

Q. Endorsed?

A. Straughn, Parrott & Company, C. T. Straughn; Charles G. Reed.

Mr. BERGER: $94.75. No. 4012. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to Miners' Journal Newspaper Company, or order, $94.75, for advertising liquor license transfers for 1902, and charge appropriation E, 1904, item 7. Signed by the County Commissioners. Approved and countersigned, M. J. Muldoon, County Controller. No. 167.

Q. Endorsed?

A. Robert A. Knecht; Charles G. Reed.

Mr. BERGER: $316.45. No. 4011. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County
226 Treasurer pay to Miners' Journal Newspaper Company, or order, $316.45, for advertising liquor license applications and transfers for 1901, and charge appropriation 1904, item —. Approved by the County Controller, M. J. Muldoon. Signed by the Commissioners.

Q. Endorsed?

A. Robert A. Knecht; Charles G. Reed.

Mr. BERGER: $242.40 No. 4010. County of Schuylkill. Court House account. Pottsville, Pa., January 30, 1904. County Treasurer pay to Miners' Journal Newspaper Company, or order, $242.40, for advertising liquor license applications and transfers for 1900, and charge appropriation 1904, item —. Approved and countersigned, M. J. Muldoon, County Controller. Entered in office of County Controller, No. 165. Signed by the County Commissioners.

Q. Endorsed?

A. Robert A. Knecht; Charles G. Reed.

Q. Was all the money represented by these warrants drawn out of the County treasury on behalf of John T. Shoener?

A. They were, yes, sir.

Q. What is the aggregate amount drawn out on the warrants offered in evidence?

A. $12,541.07.

Q. And how much did he pay in on account of these license moneys? You gave it to us this morning.

A. $11,001.72.

Q. How much more money, then, was withdrawn from the treasury on behalf of Shoener, as Clerk of the Court of Quarter Sessions, than was paid in?
A. $1539.35.

By Mr. REILLY:

Q. That is, there were warrants drawn for that amount more than the cash paid in?
A. Yes, sir.
227 Q. All of those warrants that are endorsed last by Charles G. Reed, does that indicate he is the person to whom the money was paid?
A. Yes, sir.
Q. Did you pay these warrants?
A. I did.
Q. Yourself, personally?
A. Yes, sir.
Q. And it would represent that amount of cash?
A. Yes, sir.
Q. That the face of the warrants represents?
A. Yes, sir.
Q. Now you say that the credits that appear upon your book, which you testified about a while ago, were also all paid in in cash?
A. Yes, sir.
Q. Who paid the money?
A. Charles G. Reed.
Q. You received it?
A. Yes, sir.
Q. How much money did he pay in?
A. $11,001.72.
Q. When did he pay it?
A. At different dates between January 30, 1904, and March 7, 1904.
Q. Were the items given at different times, or did he pay that much all at once?
A. At different times.
Q. Did he pay that money in at the same time that he presented any of these warrants?
A. On some of the dates, yes, sir.

By the COURT:

Q. Do you mean all of it or some of it?
A. Part of it.

By Mr. REILLY:

Q. I will ask you the question, was all of it, all of the warrants that are endorsed by him, did he pay into the County treasury in cash an amount equal to the amount called for by the warrants?
228 A. No, sir.
Q. At any other time, did he?

A. No, sir.

Q. You said that he paid in as much in cash as the warrants called for.

Mr. FARQUHAR: He said the contrary; it was $1539——

Mr. REILLY: He does not understand me. I am speaking now of the warrants that are endorsed by Charles G. Reed.

Q. You have a couple of warrants there that are not endorsed by him?

A. Only one, this one, $187.35.

Q. Then these warrants were not paid out of the County funds in the hands of the County Treasurer; they were paid out of the money that Mr. Reed deposited?

A. Yes, sir, for the credit of John T. Shoener.

Q. And was not the money just put in one window and handed out at the same window?

A. Not all of it.

Q. How much of it was not? How much cash did Charles G. Reed pay into the County treasury?

A. $11,001.72.

Q. He paid that much in cash?

A. Yes, sir.

Q. And he drew that much in cash?

A. Drew out more.

Q. Charles G. Reed did?

A. Yes, sir.

Q. Show me the warrants that he drew in excess of the amount of cash he paid in. I know the amount.

A. Charles G. Reed drew out $1352 more than he paid in.

Q. That is, he presented warrants on the County Treasurer, drawn by the County Commissioners, that amounted to
229 $1300 more than the amount of money that he put into the County Treasury?

A. Yes, sir.

Q. Can you select or pick out the warrants that make up that $1300?

Mr. BERGER: The warrants speak for themselves.

A. There is no warrant for that amount.

By the COURT:

Q. That makes up the $1352?

A. There is no warrant for that amount.

By Mr. REILLY:

Q. But there may be several warrants for that amount.

Mr. BERGER: If there are, it is only a matter of comparison, and it is simply a waste of time to select them now.

Q. Then as a matter of fact, the funds in the County treasury were not affected at all by the payment of these warants?

A. In what way?

Q. I mean, as you have just said, that you had money enough received from Charles Reed, the person to whom you paid the warrants, to pay off——

Mr. FARQUHAR: He said the opposite.

Q. With the exception of $1300.

A. Yes, sir; we had enough with the exception of that.

Q. Did you not know that that money was paid over to you, as representing the Treasurer, for the very purpose of being handed back to Mr. Reed in the settlement of these warrants?

A. No, I did not—We had received money previously for fees.

Q. I know, but I am speaking of the payment of these particular warrants, that is, the $11,001.72. You say you are the person attended to the transaction?

A. Yes, sir.

Q. Received the money and paid the warrants?

230 A. That money was paid in to meet these warrants.

Q. And was it not done at the time that the warrants were presented?

A. Not at the same dates, all of it. Part of the warrants were, but not all of the warrants.

Q. Were not some of them paid in the identical money that Mr. Reed handed to you?

A. No, sir.

Q. Do you not know, and was it not so stated and explained to you at the time, that that was done for the purpose of adjusting the accounts of John T. Shoener with the County?

A. There was nothing stated to us in reference to that. All we did was receipt for the money that was paid in, and there was no statement made to us; the statements were made to the Controller.

Q. That is, you gave Reed, when he made these payments, a receipt for having received so much money from John T. Shoener?

A. Yes, sir.

Q. And then you used the money, or part of it, to pay the warrants that were drawn in favor of John T. Shoener?

A. Yes, sir.

Q. And those transactions occurred—now again I will ask you—between what dates?

A. January 30th and March 7th, 1904.

Q. State whether or not the effect of that transaction was not to give Shoener credit on the Treasurer's books in your account with Shoener, for the amount represented by those warrants, without the deduction of a dollar out of the County treasury?

Mr. FARQUHAR: Objected to; the effect of it is for the jury.

The COURT: The effect of it is for the jury.

Mr. REILLY: The effect in the account?

231 The COURT: That is simply asking his opinion. That is a matter anybody can determine.

Q. These items that you gave Shoener credit for are the items, up to the amount of $11,001.72, of the money that Charles G. Reed paid in to you as County Treasurer?

A. Yes, sir.

Q. The $1352, does that represent those warrants, do they represent the payment of that much money out of the County treasury?

A. It represents money that had been paid in by Mr. Shoener before for fees and things of that kind, fees and miscellaneous receipts.

Q. But the money was not drawn out again on those warrants by Shoener?

A. No, sir.

Q. It was simply used as a cash asset in keeping your accounts, to give him credit for that amount; that is, he would have been entitled to have drawn it, but the warrant was used as cash to square up his account?

A. Cash was paid out for every warrant represented here.

Q. The warrant, of course, would represent so much cash paid out by you, but Mr. Shoener did not get that cash?

A. I do not know; he had endorsed these and handed them over. Mr. Reed brought them. Of course I do not know if he got the money or not.

Q. I am speaking now of the $1300 warrant.

A. It is among those——

Q. The total amount of credits, then, that you give to Mr. Shoener in your account with him is twelve thousand and how much?

A. $12,541.07.

Mr. FARQUHAR: You misrepresent. You do not give him credit for that amount. It is not an account with him.

232 Q. What do you mean by the credit of twelve thousand and—How much do you say it is?

A. $12,541.07.

Q. What makes up that amount?

A. Payments of the liquor license applications and advertising liquor license applications, and printed matter, salaries, and things of that kind, for the years 1900, 1901 and 1902.

Q. They are in the same account and credited on the same page with the eleven thousand dollars, are they not?

A. On the opposite page.

Q. And are amounts which Shoener would be entitled to credit for in the settlement of his account with the County?

A. Yes, sir.

Q. Were you present or a party—I did ask it in another way—to the negotiations that were pending between Mr. Shoener or his attorneys and the County Commissioners or County Controller, in reference to adjusting his accounts?

A. No, sir.

Q. You do not know anything about such arrangement?

A. Not a thing.

Q. Do you know where Mr. Reed got that $11,001.72 cash that he paid into the County treasury?

A. I do not.

Q. Do not know who furnished the money?

A. No, sir.

F. J. NOONAN, called and sworn.

Examined by Mr. BERGER:

Q. Where do you live?
A. St. Nicholas.
Q. What is your official position?
A. County Treasurer.
233 Q. Of what?
A. Schuylkill County.
Q. When did you assume the duties of your office?
A. The first Monday in January, 1903.
Q. State whether or not you made demand upon John T. Shoener on or about the 30th of June, 1905, for the payment of the sum of $7243.28 into the County treasury.

Mr. REILLY: The question is objectionable, because it is so very leading.

A. I did make demand for $7243.28.
Q. When did you make that demand upon Mr. Shoener?
A. I think on the 30th of June.
Q. This year?
A. This year.
Q. Was the demand in writing?
A. The demand was in writing.
Q. Did you serve him with a copy?
A. I did.
Q. Have you the original?
A. The original is with him. I have a copy of that.

Mr. BERGER: Will you produce the original? I call upon the defence to produce the original.
Mr. REILLY: We had no notice to produce it; I never saw it.
Mr. BERGER: We then offer in evidence the copy.
Mr. REILLY: We object to a copy. You should have served notice on us, if we had the original. Your questions led me to believe until this morning that the demand was oral.
Mr. BERGER: We call upon you now for the original.
Mr. REILLY: We have not got the original.
234 Mr. FARQUHAR: We call upon Mr. Shoener for the original.
Mr. REILLY: We will not quibble about it. If it is in writing, we have no doubt the copy Mr. Noonan has is the correct one.
Q. Read the copy.
Mr. MOYER: Let us see the copy. (Copy produced.)
Mr. REILLY: If Mr. Noonan says that is a copy, that is entirely satisfactory to us.

By the COURT:

Q. Do you say that is the copy?
A. That is the copy, yes, sir, simply a carbon copy made from the original as it was struck off.

By Mr. BERGER:

Q. This is a copy of the notice you served upon him?
A. This is a copy of the notice.

Mr. BERGER: The copy is offered in evidence, as follows:

"JUNE 26, 1905.

To John T. Shoener, Late Clerk of the Court of Quarter Sessions of the Peace, &c., of Schuylkill County.

DEAR SIR:—I hereby demand and require of you to pay over to me, as Treasurer of said County, the sum of $7,243.28, being the amount due by you to said County as shown by the certified statement hereto annexed, with interest thereon from January 5, 1903.

Yours truly, F. J. NOONAN,
County Treasurer."

Q. Have you a copy of the certified statement that was annexed?
A. Yes, I have a copy of that.

235 Mr. BERGER: Will you kindly produce it? We call upon the Defendant to produce the copy of the certified statement.

Mr. REILLY: The only objection or criticism I have to the District Attorney making such a display of that is to do it in the way of such a complete surprise. If they wanted these papers they knew it before the trial began, and as a matter of fact in ordinary courtesy they might have let us know or served us. I did not until this morning know that the demand was ever made in writing, or any papers were served at all.

The COURT: It being a part of the copy that was served.

Mr. REILLY: I do not object to it so much on that account, but I do think it is not exactly the right thing to stand up here before the Court and make a demand on us to produce a paper on the spur of the moment.

The COURT: Let him read the copy.

Q. This is a copy of the statement that was attached to the notice just offered in evidence? (Paper handed witness.)
A. It is.

(Copy of letter marked "Ex. No. 5, 9-7-05, H. C. W.")

Mr. REILLY: I want to ask a few questions before I say whether I will object or agree to admit it.

By Mr. REILLY:

Q. Who prepared the demand that you have just read, that you served on Mr. Shoener?
A. I did.
Q. And who prepared the statement that accompanied it?
A. The statement was furnished us by the County Controller's office—by the County Controller.

236 Q. And did you attach it?
A. I attached it.

Q. You had nothing to do with the preparation of this accompanying statement?

A. I had not.

Q. And know nothing about the correctness of it?

A. I have no record other than what has been presented here, the transactions between Mr. Shoener and the County.

Q. How did you come to get this statement from the Controller and attach it to your demand?

A. First by a request being made upon me——

Q. By whom?

A. To make demand for this money.

Mr. FARQUHAR: We object; it is immaterial by whom it was made. How is that evidence?

The COURT: I do not understand the purpose?

Mr. REILLY: The purpose of it is to see what this statement amounts to. They get up a document here that they attach to a demand which they had a right to make, as they claim, which was necessary to make, and I do not think that the Commonwealth is permitted to manufacture evidence in this way.

The COURT: There is now only the offer of service of the paper on him, making a demand. You can contradict or dispute your liability for anything that is demanded there hereafter, but you are now undertaking to prove before it is established——

Mr. REILLY: I want to find out before they offer it, whether I shall object to it or not; that is the purpose of my preliminary cross-examination. If it is a document with which Mr. Noonan had nothing to do, that for the convenience or purpose of somebody else, at the instance of somebody else, he attached to this notice and served upon Mr. Shoener, I do not see why it should be turned to the advantage of the Commonwealth.

237 The COURT: As being a demand made; that was the evidence.

Mr. REILLY: This is an accompanying paper.

The COURT: That was attached to it, he says, and part of it.

A. Attached to it, and part of it.

Mr. REILLY: It was no part of Mr. Noonan's demand.

The COURT: Yes, it was.

Mr. REILLY: He did it, as I am trying to show, to accommodate or to serve the purpose of some third party, and if I can show that, I think it would be good ground of objection.

Mr. FARQUHAR: If Mr. Noonan chooses to make an official act at the request of somebody else, he adopts that and it is Mr. Noonan's act, no matter who asked him to do it.

The COURT: Anything that bears on the question of the service of it or the correctness of it I think you may ask, if he had knowledge of it.

Q. Where did you make this or serve this demand upon Mr. Shoener?

A. Just on a farm a little this side of Orwigsburg, Mr. Shoener's.

Mr. BERGER: We have not offered that paper yet. We now propose to offer it. We now offer the copy of the statement at-

tached to the notice already offered in evidence, served upon Mr. Shoener by Mr. Noonan.

Mr. REILLY: This is objected to as immaterial, incompetent and irrelevant, being no part of the demand, and a paper that was not prepared by the County Treasurer, with which he had nothing to do.

The COURT: We think as being a part of the paper which
238 has already been admitted, and having been read, and as being a part of the paper that was served on the Defendant for the purpose of making a demand of what it was claimed he was indebted to the County, it may be given in evidence, in view of the fact that the Defendant has not presented the statement here when called upon by the Commonwealth; and for that purpose only we permit the paper to be given in evidence, as showing what it was that was served on the Defendant.

Mr. Berger reads paper as follows:

"In the Court of Quarter Sessions of the Peace in and for Schuylkill County.

No. 175, March Term, 1903.

COMMONWEALTH
vs.
JOHN T. SHOENER.

Charge—Embezzlement and misdemeanor in office.
Verdict 7 January, 1904.

I, H. J. Muldoon, County Controller of Schuylkill County, do hereby certify that on 7 January, 1904, the date of the entry of the verdict in the above stated case, John T. Shoener, the Defendant, had failed to pay over to the County of Schuylkill the sum of $18,245; and I further certify that since the 7th day of January, 1904, the following credits to said John T. Shoener have been entered on the books of the County of Schuylkill, viz:

1904.		
30 Jan.	Cash, as per receipt	$1,436 35.
1 Feb.		3,900 00.
3 Feb.		1,075 00.
3 Feb.		43 65.
3 Feb.		705 00.
5 Feb.		1,051 35.
9 Feb.		2,690 02.
7 Mar.		100 35.
	Total	$11,001 72.
Balance 7 March, 1904		$7,243 28.

239 Witness my hand this 7th day of March, 1904.

H. J. MULDOON,
County Controller.

And now, 7 March, 1904, the foregoing certificate is hereby ordered and directed to be filed by the Clerk of the Court of Quarter Sessions and a copy thereof certified by said Clerk to the Court of Common Pleas of Schuylkill County. By the Court.

ISAAC BALL,
Clerk of Quarter Sessions.

I, Isaac Ball, Clerk of the Court of Quarter Sessions of Schuylkill County, hereby certify that the foregoing is a correct copy of the statement and the order of the Court in the above cause on file in my office.

ISAAC BALL,
Clerk Quarter Sessions.

Seal attached. True copy.

(Marked "Ex. No. 6, 9-7-05, H. C. W.")

By Mr. BERGER:

Q. Where did you make this demand on Mr. Shoener?
A. On his farm just this side of Orwigsburg.
Q. When?
A. On the 30th of June.
Q. This year?
A. This year.
Q. What reply, if any, did he make to you?
A. I am quite positive it was the 30th. The notice was dated the 26th of June; I am quite positive it was the Friday following. The notice was dated the 26th, and I had made a few inquiries, I thought I might meet Mr. Shoener in Pottsville; called on the 'phone once or twice; in fact, I did not care to go to his home, but later on in the week I determined to serve it, and went down and met him on his farm just this side of Orwigsburg, read the notice, and handed it to him.

240 Q. What reply, if any, did he make to you at that time?
A. He made no reply concerning payment or non-payment of it.

Q. Has he, since that time, paid any money into the County treasury on his account as Clerk of the Court of Quarter Sessions?
A. He has not.
Q. Has he, since the date given in the copy of the statement attached to the notice, namely, March 7, 1904, paid any money into the County treasury, on account of his account as Clerk of the Court of Quarter Sessions?
A. He has not.

By the COURT:

Q. Has paid nothing since March 7th, 1904?
A. 1904.

By Mr. BERGER:

Q. Since that date he has made no payment into the County treasury?

A. He has not.
Q. Nor since June 30, 1905?
A. He has not since that time.

(No cross-examination.)
(Commonwealth rests.)

Mr. REILLY: I would like to dictate a motion, if your Honor will permit me, instead of writing it out.

The testimony on the part of the Commonwealth having shown no demand by the proper officer upon the Defendant to pay over the moneys alleged in the indictment to be in his hands, and with the failure to pay over which he is charged, within two years from the time said moneys were received by Defendant, as shown by the Commonwealth's evidence, or within two years after the judicial determination of the civil suit between the Defendant and the
241 County of Schuylkill to determine the lawful ownership of said moneys, and the testimony on the part of the Commonwealth further having failed to show that the moneys alleged in the indictment, $7,243.28, are any part of the license moneys received during the years 1900, 1901 and 1902, as alleged in the indictment, as being part thereof, the Defendant respectfully requests the Court to direct a verdict of not guilty.

The COURT: We will overrule the motion to direct a verdict.

Defendant excepts. Bill sealed.

Mr. REILLY: Does your Honor consider the record in evidence in this case?

The COURT: Certainly. I consider it offered to sustain the plea that the Defendant made, claiming that he had previously been acquitted.

Mr. REILLY: It is evidence in the case for all and any purpose.

The COURT: It does not make much difference. Do you want to offer it in evidence now?

Mr. REILLY: Yes, we do; if there is any question about it, we certainly want to offer it.

Mr. BERGER: The Commonwealth considers the record referred to as being in evidence because brought into evidence by the special plea filed by the defendant, to which the Commonwealth demurred.

Mr. REILLY: The defendant considers it in evidence for all purposes, the Court having referred to it in the ruling made upon the demurrer filed by the defendant.

The COURT: It was given in evidence; there is no question about that; it was handed up to me for that purpose.

Mr. Wilhelm opens case for Defendant.

Mr. REILLY: So that there may be no question, we formally offer in evidence the record.

242 Mr. BERGER: We ask that the purpose be stated.

Mr. REILLY: Defendant proposes to offer in evidence the record of the indictment, trial and proceedings thereon, the judgment of the Supreme Court, the appeal in the same case, in the case of the Commonwealth *vs.* John T. Shoener, the Defendant at bar, for

the purpose of showing that this Defendant is the same identical person who was the Defendant in that case; that the indictment therein, upon which he was tried, charged him with the same offence charged in this indictment, and that he was acquitted thereof by the jury, and that he cannot therefore be tried under this indictment a second time for the same offence. No. 175 March Term, 1903, the Court of Quarter Sessions of Schuylkill County, and No. 47 October Term, 1904, of the Supreme Court of Pennsylvania, Eastern District.

Mr. BERGER: Is it not the same record that was pleaded in bar yesterday?

Mr. REILLY: Yes.

Mr. FARQUHAR: We desire to object to the introduction of this evidence for the purpose for which it is offered, for the reason that it is a matter for the Court and not for the jury; second, it is *res adjudicata;* the Court has already determined the question, and the Defendant had submitted the question to the Court for its determination, and he is bound by that determination of the matter. It is further objected that the testimony at the present time is immaterial, irrelevant and incompetent.

The COURT: Our disposition is to hear what evidence they have in relation to this, and determine what shall be done with it after we know what all the evidence is bearing on the subject. It is true the Court has passed upon the effect of that record on their former plea, but the authorities show in some instances that it may be disposed of by the Court either before a jury or before the Court, and
243 the Court may direct a verdict if the evidence is not sufficient, although it has been submitted to the jury. At present we will hear the evidence, in order that there may be no cause of complaint upon that subject, and consider it hereafter.

Mr. Reilly offers in evidence the record from Sessions Docket 1903, page 21. Commonwealth *vs.* John T. Shoener. No. 175 March Term, 1903. Charge: Embezzlement and misdemeanor in office. On information and oath of M. J. Muldoon. January 4, 1904, Defendant pleads not guilty. Same day, a jury being called the following came, to wit: Charles Folk, James Foley, Charles Parmley, E. D. Stutzman, Jacob Zimmerman, George E. Lehr, William Dando, William Leffler, John H. Wells, George Bierman, M. S. Greenawald, Charles Hooks. Rendered a verdict, Guilty as to counts 4, 8 and 12, and not guilty as to any of the other counts of the within indictment.

Judgment of the Supreme Court in the case of Commonwealth *vs.* John T. Shoener. No. 286, January Term, 1904. Appeal from the Superior Court filed June 22, 1905. The judgment of the Superior Court is reversed, as is that of the Court below, and the Defendant is discharged from his recognizance. With the remittitur, attested by the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court, at Philadelphia, the 29th of June in the year of our Lord one thousand nine hundred and five, setting forth:

"Whereas, by virtue of our writ of *certiorari* from our Supreme Court of Pennsylvania for the Eastern District, returnable in the same Court on the second Monday of February in the year of our

Lord one thousand nine hundred and five, a record was brought into the same Court upon appeal by John T. Shoener from judgment of the Superior Court of Pennsylvania in No. 47, October Term, 1904, wherein the judgment of the Quarter Sessions Court
244 of Schuylkill County, No. 175, March Term, 1903, was reversed, modified, &c., wherein the Commonwealth of Pennsylvania was Plaintiff and the said Appellant was Defendant, and it was so proceeded in in our said Supreme Court that the following judgment was made, to wit: The judgment of the Superior Court is reversed, as is that of the Court below, and the Defendant is discharged from his recognizance. And the records and proceedings thereupon and all things concerning the same, agreeably to the Act of Assembly in such case made and provided, are ordered by the said Supreme Court to be remitted to the Court of Quarter Sessions of the County of Schuylkill, aforesaid, as well for execution or otherwise as to justice shall appertain. Wherefore we here remit you the record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise as aforesaid."

Mr. REILLY: There does not appear to be any date when it was filed here.

The COURT: The remittitur ought to tell when it was filed.

Mr. BERGER: We admit that it was filed.

Mr. REILLY: We desire also to offer the record—that is already in evidence, I believe—in case of Commonwealth, No. 61 January Term, 1902.

Mr. FARQUHAR: That is in evidence.

Mr. REILLY: In the case stated. For the purpose of specially offering in evidence at this time the case stated between the County of Schuylkill and the Defendant therein, John T. Shoener.

Mr. BERGER: For what purpose?

Mr. REILLY: Defendant offers in evidence the agreement in the case stated between the County of Schuylkill and the Defendant, John T. Shoener, in the case mentioned, to be followed by evidence that for a period of twenty-six months of the term of the said John T. Shoener as Clerk of the Court of Quarter Sessions the
245 County of Schuylkill refused to draw any warrants for the payment of the salary due to him by law, or the salary of any of his deputies, or for expenses of his office, and that it was part of the agreement in the case stated that upon the judicial determination of the ownership of the license fees, if decided against the Defendant, credit should be allowed him in such settlement for any disbursements made by him on account of the payment of salary due to himself or his deputies, or for expenses of his office. Further to be followed by evidence that no such settlement has up to this time, ever been finally made or adjusted; that efforts, during and since the decision of the Supreme Court, in May, 1903, have been made to adjust said accounts, to ascertain what balance, if any, might be due by the Defendant to the County upon a full and final settlement of the account between them, as contemplated and provided for in the case stated.

The COURT: What agreement do you refer to?

Mr. REILLY: That case stated, I guess, has not been called to our attention. (Case stated handed to the Court.)

The COURT: If you have any other credits, that are not allowed here, that have not been included there, the Defendant can prove them; but if there are no other credits, what is the use of staying here to prove them over again?

Mr. BERGER: We will not object to any credits in addition to those that they may have, if they can prove them.

The COURT: The very last paragraph in the case stated says it shall be subject to the expenses of the office if there is a judgment entered. That does not make any agreement other than what the Act of Assembly requires.

246 Mr. REILLY: That is the agreement I refer to, or the provision.

The COURT: It would have been subject to that if they had never put that there, under the Act of Assembly.

Mr. REILLY: This as bearing upon the unlawful act of the Defendant, and to rebut the allegation in the indictment that he unlawfully withholds this money. If we can show there is an unsettled account between them——

The COURT: Show that; show what amount you are entitled to credit for, that you have not received.

Mr. REILLY: That is part of our offer. I propose to produce the Chief Clerk of the Commissioners on the stand to show that for this period of twenty-six months the County Commissioners never issued a warrant on the County treasury in favor of John T. Shoener for his salary or of his deputies, for salary or for any other expenses of the office.

The COURT: Show the agreement that there was to be any different arrangement from that which the law points out. I am not going to hear evidence on the proposition that there is an agreement until we know there is, because the difficulty in the way is to undertake to prove an agreement contrary to the Act of Assembly.

Mr. REILLY: Let me finish my offer and have a ruling on it. (Previous offer read.) This for the purpose of rebutting the allegation in the indictment as to the amount that is therein stated to be due or demanded from the Defendant as due, and as bearing upon the question of the Defendant's guilt or innocence of the charge contained in the indictment.

Mr. FARQUHAR: This is objected to, first, that the testimony offered does not show or tend to show that there was less money due

247 than charged in the indictment; second, it does not tend to show that he was not guilty of the crime charged. The Commonwealth have no objections to any payments made by Mr. Shoener, or any other credits to which he is legally entitled, that have not been given in evidence by the Commonwealth.

The COURT: It having now been determined by the decision of the Supreme Court that the license money in question never did belong to the Clerk, and the Act of Assembly requiring that the money should be paid into the treasury of Schuylkill County and the claims of the Clerk disposed of in accordance with the provisions

of the Act of Assembly regulating the disposition of such claims and such questions, and there being no express agreement shown, as attached to this case stated, to change or undertake to change the methods of settling any claims of an official of the County with the County, or establish any system different from that provided for under the Act of Assembly, we cannot admit the offer as now offered, nor for the purposes offered; but we say that the Commonwealth having already given in evidence, from the records of the office, the credits that have been allowed to the Defendant since the time that the Supreme Court decided that he had no right to this license money, having specified exactly what these credits arise from, putting the vouchers in evidence and referring to the book, and giving the total sum, as well as the total amount claimed by the County from the Defendant, if now there be any other credit that the Defendant is entitled to, or claims, or can assert or show, he shall have full opportunity to do so.

Defendant excepts.

Bill sealed.

WILLIAM WILHELM, called and affirmed.

(Witness withdrawn.)

248 C. S. COMMINGS, called and sworn.

Examined by Mr. REILLY:

Mr. *Reilly*: Our offer here, I will state, probably will be pretty much what is included in the former offer as ruled by your Honor, but I would like to make this offer in this connection.

Q. You are the Chief Clerk to the County Commissioners?

A. No, sir; I am tax clerk at the present time.

Q. You were Chief Clerk?

A. No, sir; I was warrant clerk.

Q. Did you hold that position during the time that John T. Shoener was Clerk of the Courts?

A. Yes, sir.

Q. Will you state to the Court whether any warrants were drawn on the County Treasurer in favor of John T. Shoener or any of his deputies, during part of his term?

Mr. FARQUHAR: We object to that as being incompetent and immaterial. What is the purpose?

Mr. REILLY: This evidence is offered for the purpose of showing that the accounts between John T. Shoener, the Defendant, and the County of Schuylkill, growing out of the receipt of license fees for license moneys received by him, have never been adjusted, and that in the adjustment of the account was to be included the salary of the Defendant as Clerk of the Court, and the salary of his deputies, advertising, and other expenses of the office, which were withheld by the County of Schuylkill during said period of twenty-six months.

The COURT: You say "during said period of twenty-six months." Do you mean that they have been since allowed? What do you mean by saying during that period?

Mr. REILLY: During the period, twenty-six months of his term.

249 The COURT: How is that important here if they were subsequently allowed?

Mr. REILLY: To show that the accounts are still open and not finally adjusted, and that in the adjustment of the account they were included in ascertaining what balance, if any, would be due by the defendant to the County upon a full and final settlement.

Mr. FARQUHAR: If they will put upon record that they claim certain amounts due for salary or any other thing, to Mr. Shoener, and that he was entitled to credits, we would not object, because we do not want anything but what is right in this matter.

The COURT: I do not know that anybody is asserting whether there were or were not any warrants issued during that period, and it does not make any difference whether there was or not. If it is for the purpose of showing that at that time there was an unsettled account, then you have it there, because they have allowed it. There it is, every warrant and every paper relating to it.

Mr. REILLY: That is our offer.

Mr. FARQUHAR: We say it is immaterial, irrelevant and incompetent.

Mr. BERGER: I would ask whether it is proposed to prove that there is any money due to the Defendant, John T. Shoener, on account of any salary, or whether it is proposed to prove that there is any money due John T. Shoener on account of advertising, or whether it is proposed to prove that there is any money due John T. Shoener on account of the deputies whom he employed in his office.

Mr. REILLY: It is proposed to prove that there are certain credits which he claims to be entitled to, but which have not been allowed him.

The COURT: Go on and prove what credits he claims to be entitled to, that have not been allowed.

250 Mr. REILLY: Your honor will dispose of this offer so far as this witness is concerned?

The COURT: So far as anything now appears before us, we think it is immaterial whether, at this particular time, warrants were issued or not, and therefore we sustain the objection upon the ground that the offer, as far as shown to us now, is immaterial. On the subject of whether there are any claims that Mr. Shoener has, that have not been allowed him, evidence can be offered on that, as we have repeatedly said, and it can be specified and shown what he has a right to receive or what he claims to receive. As to whether or not he has been allowed any claims since the decision in the civil court, it is already on record from the books and the vouchers, and is on the record in this case, every item that they admit.

Mr. REILLY: The Commonwealth's own evidence shows that he is entitled to much larger credit than they have allowed, and that the balance due by him is not what is alleged in the indictment, by two thousand dollars.

The COURT: I do not understand what you mean by that.

Mr. REILLY: Mr. Depew has testified that the credits to Shoener

were over twelve thousand dollars, and that the account shows that the license moneys the Commonwealth shows were $18,245, and the difference between them is not the amount set forth in the indictment.

Mr. FARQUHAR: You entirely misunderstood his testimony. The only credits to Mr. Shoener are $11,001.72.

Mr. REILLY: The record will show.

Mr. FARQUHAR: The record will show differently. He said over and over again that this account merely showed what money
251 had been paid into the treasury by Mr. Shoener, and what the Treasurer had done with the money. But this $12,000, instead of being a credit, shows what was paid out by the Treasurer to the officials a-d office expenses of Mr. Shoener's office. That is not a credit to Mr. Shoener.

Mr. REILLY: Mr. Depew testified positively twice that Mr. Shoener was entitled to a credit for that amount against the license money.

(Testimony of C. E. Depew on this subject read.)

Mr. REILLY: I propose to prove by Mr. Wilhelm, first, that he advised Shoener professionally that he had a right to withhold these moneys; and second, that following the decision of the Supreme Court efforts to adjust the account between Shoener and the County were undertaken and carried on for a long period of time; as bearing upon the question of what amount was due to the County, if any, and as to the question of the Defendant's guilt or innocence of unlawfully withholding any money due to the County.

Mr. FARQUHAR: We shall object to that offer as immaterial, irrelevant and incompetent.

The COURT: If there was any advice given by counsel, since the Court declare that he was not entitled to hold any of this money which was paid over, I cannot see how counsel could relieve a man from crime by advising him that he could hold the money, in the face of the decision of the Supreme Court.

Mr. REILLY: That part of the offer was relating to the original withholding.

The COURT: This allegation is a conversion since then. There is no allegation here of a conversion before, and I would not allow you to prove that if there were, because I would say it concerned the other prosecution entirely, could not have any application here, and there is no allegation here since the decision of the Supreme Court.

252 Mr. REILLY: The offer was as to matters subsequent to the decision of the Superior Court, simply that an effort was being made and carried on to effect a settlement of the accounts between Shoener and the County, growing out of this confused state of affairs that had continued for over two years, by the withholding of his salary and the salary of his deputies and other expenses, for all of which Shoener claimed he should be allowed.

The COURT: If he has been allowed credit for his claims, as they claim here, he is entitled to that credit. How long it took to make that settlement cannot be important; but if he has any other claim,

that would be important. I do not want to make suggestions, but the natural thing that would result from it would be, if he says, I am entitled to a thousand dollars, or fifteen hundred dollars, or two thousand dollars, that they have not allowed me credit for, you prove that; but the question is, why did you not pay over the balance the Supreme Court have now decided you should pay over.

Mr. REILLY: The question is relevant as bearing on the correctness of the amount charged or alleged in this indictment.

The COURT: Show any amount that you have not been allowed for. Of course a conversion must not necessarily be the exact amount named in the indictment. It may be less; it cannot be more. We are perfectly willing to hear anything at all that shows a claim well founded, or a just claim on the part of the defense. We do not want to have a lot of immaterial matter.

Mr. REILLY: In the view we took of the case, we thought this was all pertinent, but I am willing to concede it was much more so on the former trial than on this.

I do not want to take up any more time, but I do not believe we will have any more testimony, except some documentary evi-
253 dence. We are having Mr. Depew make up a statement of Shoener's account; it will take very little time, but under your Honor's ruling we have no other evidence but that which I think would come under the same objections, and I have the benefit of it now, and there is no use in accumulating the record further.

The COURT: If that is all you want to get, and the account is not made up, I feel like giving you a chance to get it, and not closing up this evening.

Mr. REILLY: We had Mr. Kaercher and two or three other witnesses, but they are along that same line, as bearing on the settlement, and under your Honor's ruling it would not be evidence, and there is no use in wearying the Court with repeated offers that come under the one ruling.

The COURT: Then with the understanding that you want that documentary evidence that you speak of, we will let the case go over until to-morrow morning.

Mr. REILLY: And we desire to offer the Act of Assembly of 1897, under which this money was collected.

The COURT: The Court would be bound to take notice of it, as far as it applies to the case.

Mr. REILLY: Unless something very special should occur to our minds, that would be satisfactory to the Court.

(Adjourned until Friday, September 8, 1905, 9 A. M.)

FRIDAY, *September* 8, 1905—9:00 a. m.

(Mr. Reilly calls for M. J. Muldoon.)

Mr. FARQUHAR: What do you propose to prove by M. J. Muldoon?

254 Mr. REILLY: We expected to prove by Mr. Muldoon that there never had been any full settlement of the account of

Shoener with the County, and that he had made a demand for settlement prior to the trial of the last case.

Mr. FARQUHAR: We object to that as immaterial and irrelevant.

The COURT: You better get the witness here if you want to offer anything, and let him take the stand and let us know what you are asking him.

Mr. REILLY: He is not around; he was subpœnaed and notified to be here.

The COURT: Is there anything else? I understood this testimony was closed, with the exception of documentary evidence. That was the distinct understanding last evening.

A. J. SHORTALL, called and sworn.

Examined by Mr. WILHELM:

Q. What is your business?

Mr. FARQUHAR: What do you propose to prove by this witness?

Mr. WILHELM: I propose to prove by this witness that the prosecutor in this case is no County official, no one employed by the County or for the County; that he is not acting in his individual capacity, but that he represents a combine who are pursuing Mr. Shoener for their own selfish ends, and not in the ends of justice.

Mr. FARQUHAR: We object, first, that the testimony offered is incompetent and irrelevant; and in the second place, that it was understood last night that this case was closed with the offering of documentary evidence.

The COURT: That was the understanding. I think an
255 understanding ought to be an understanding.

Mr. WILHELM: We think we have a right to show who the prosecutor is in this case.

The COURT: The record shows who the prosecutor is.

Mr. WILHELM: The record does not always show who the real prosecutor is. If your Honor wants to rule it out, rule it and we will get an exception. A defendant always has a right to know who his accuser is.

Mr. MOYER: You will find that the law says a jury may find who the prosecutor is, and sometimes visit them with costs, under certain circumstances.

The COURT: You may ask him whether he is the prosecutor as a private citizen, or whether he prosecutes representing a combine; he may answer that.

Mr. MOYER: That is all we can ask, I think. While it was understood that we were not to hear testimony, this is a matter that came up since.

Mr. WILHELM: It is a matter we overlooked at the time.

The COURT: Go on and ask him.

Q. Whom do you represent in this prosecution?

A. I represent the Taxpayers' Association of Schuylkill County.

(No cross-examination.)

(Testimony closed.)

Mr. Reilly closes case for Defendant.
Mr. Berger closes case for Commonwealth.
Whereupon the Court charges the jury.

256 I hereby certify that the foregoing is a correct transcript of my stenographic notes.

H. C. WILSON,
Asst. Sten.

Copy of Case Stated Offered in Evidence.

In the Court of Common Pleas of Schuylkill County.

No. 61, January Term, 1902.

THE COUNTY OF SCHUYLKILL
vs.
JOHN T. SHOENER, Clerk of the Courts of the County of Schuylkill.

Action in Assumpsit.

Case Stated.

And now, November 21st, 1901, an action of assumpsit having been entered in the above stated case, it is hereby agreed by and between the parties to the above stated action that the following case be stated for the opinion of the Court in the nature of a special verdict:

1st. That John T. Shoener, Clerk of the Courts of Schuylkill County, in accordance with Section 3, pages 469 and 470, P. L. 1897, which provides: "Every person intending to apply for license as aforesaid under this or any other Act of Assembly in any city or county of this Commonwealth, on and after the passage of this act, shall file with the clerk of the Court of Quarter Sessions of the proper county his, her or their petition, at least three weeks before the first day of the session of the Court at which the same is to be heard, and shall, at the same time, pay said clerk five dollars for expenses connected therewith; and said clerk shall cause to be published two times in three newspapers designated by him, one of which may be printed in the German language, a list containing the
257 names of all such applicants, their respective residences, and the place for which application is made; and the cost of the publication shall not exceed the usual rates charged by such newspapers; the first publication shall not be less than fifteen nor more than twenty-five days before the time fixed by the Court: Provided, The amount to be paid for such advertisement shall not, in the aggregate, exceed the five dollars provided in this section to be paid by such applicant for expenses," collected the said Five Dollars ($5.00) from every petitioner, who applied for license under the provisions of the said Act, to January Term, 1901.

2nd. That there were 1076 applicants, under the provisions of said

Act, to January Term, 1901, and that the said John T. Shoener, Clerk, &c., collected $5,380.00 from the said applicants.

3rd. That John T. Shoener, Clerk &c., retained said $5,380.00 and refused to pay it into the County Treasury for the reason that the Act of Assembly created the money thus collected as a special fund for the expenses of advertising and his own legal expenses incident thereto, and that after paying all expenses out of the fund made up from the said $5.00 paid by each applicant, the balance remained due to him and was not an earning of the office under the meaning of the salary Act of 1876, but was in the nature of a special fee for special services rendered.

4th. That the Commissioners contend that the said sum of $5,380.00 realized under the said Act of Assembly, was an earning of the office of the Clerk of the Courts, and in accordance with law, the said John T. Shoener, Clerk, &c., should have paid the said amount into the County Treasury as earnings of the said office, and that all legal expenses as provided for by said Act of Assembly, and appertaining thereto, should be paid out of the County Treas-
258 ury and charged up against the earnings of said office as any other item of expenses, arising from said office, is paid, and as any other fees earned by said office are made a credit thereof.

If the Court be of the opinion that the said John T. Shoener, Clerk of the Courts of Schuylkill County, had a right to retain the said $5380.00, he, the said John T. Shoener paying all expenses for services rendered, advertisements, &c., incident thereto, and had the right to retain the balance as his special fee in addition to his salary under the Act of 1876 and its provisions, and that said $5380.00 derived under said Act of 1897 was not an earning of the office, and he was not required to pay it into the County Treasury, then judgment to be entered for the defendant for the sum of $5380.00, but if not, then judgment to be entered for the plaintiff, the County of Schuylkill. The costs to follow the judgment, and either party reserving the right to sue out a writ of appeal therein to the Supreme Court. This judgment to be subject to such lawful expenses and salaries of the Clerk and his deputies as a set-off as have been withheld pending a judicial determination of the questions involved.

WM. WILHELM,
Counsel for John T. Shoener, Defendant.
CHAS. A. SNYDER,
Solicitor for the County of Schuylkill.

Opinion of the Supreme Court.

No. 175, March Term, 1903, in Lower Court.

COMMONWEALTH OF PENNSYLVANIA
vs.
JOHN T. SHOENER.

No. 47, October Term, 1904, in the Superior Court, Philadelphia District, and

259 No. 386, January Term, 1904, in the Supreme Court.

BROWN, *J.:*

John T. Shoener was elected and commissioned Clerk of the Quarter Sessions of the County of Schuylkill for the term of three years from the first Monday in January, 1900. During the three years that he served as such clerk he received from applicants for liquor licenses and for transfers of the same a fee of $5 on each application. This fee is fixed and directed to be paid by the Act of July 30th, 1897, P. L. 464. He kept an account of the fees he so received and made return of them to the county authorities; but retained them for judicial determination as to whether they belonged to him or the county. Several days before his time expired he received a note from the Controller of the County, of which the following is a copy:

"Pottsville, Pa., Dec. 30, 1902.—To John T. Schoener, Clerk of the Courts of Schuylkill County, Pa.—Dear Sir:—In accordance with the opinion of Judge Marr in the case of the County of Schuylkill *vs.* you and in behalf of the County, I ask you to make settlement on or before Dec. 31st, 1902, with the County Treasurer, for all license fees, with interest, and other County funds now in your possession. I would also call your attention to the fact that you have not made settlement with the County Treasurer for the past six months, and would ask you to do so at once. In case of failure on your part to do so by Dec. 31st, 1902, I will be obliged to institute proceedings, both civil and criminal, against you. Yours respectfully, H. J. Muldoon, Controller."

This notice, for a reason hereafter to be stated, was not heeded, and on Jan. 3rd, 1903, the Deputy Controller of the County made an information against the Appellant, charging him with having retained and converted to his own use the fees received by him for filing applications for liquor licenses and for transfers *for*
260 them. At the succeeding November Session of the Court of Quarter Sessions of the County, on this information, an indictment was found against Shoener containing 13 counts, the 1st, 2nd, 3rd, 5th, 6th, 7th, 9th, 10th and 11th charging him, in the language of the 65th Section of the Act of March 31st, 1860, P. L. 382, with having embezzled and converted to his own use the license fees collected by him during his term. The 13th charged

him with embezzlement of the fees paid on applications for the transfers of licenses. On a trial of the indictment he was acquitted by the jury on these nine counts. The 4th, 8th, and 12th charged him simply with having failed to pay over the license fees "when thereunto legally required by the County of Schuylkill, or its legally authorized officers, to the Treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same." The result of the trial, then, was an acquittal of the Defendant on the charges of converting license fees to his own use and a conviction of having failed to pay them over under an allegation that demand had been made upon him to do so. A motion in arrest of judgment and for a new trial having been denied and sentence imposed, an appeal was taken to the Superior Court, and, after considering the many questions raised, the court sustained the Appellant's conviction: Com. *vs.* Shoener, 25 Superior Court, 526.

On this appeal we regard as a fundamental question involved the sufficiency of the evidence to show that a legal demand had been made on the Appellant to pay over the fees to the County before this prosecution was instituted; or rather whether, at the time the demand is alleged to have been made, he was bound to regard it. Conceding that the letter from the Controller of Dec. 30th, 1902, was a demand, and made by the proper officer, what was the situation at that time? The offense charged was committed then or not at all, for there is no pretense that any other demand was made.

261 The County of Schuylkill brought suit in the Common Pleas to recover from the Appellant the license fees received in the year 1900. As the question involved depended on no disputed facts, the County and the Defendant submitted the determination of it to the Court on a case stated. The facts agreed upon were, that John T. Shoener, Clerk of the Quarter Sessions, had received from each applicant for a license at the January Term, 1901, a fee of $5, paid to him under the Act of 1897, P. L. 464, the third section of which provides: "Every person intending to apply for licenses as aforesaid under the provisions of this or any other Act of Assembly in any city or county of this Commonwealth, on and after the passage of this Act, shall file with the Clerk of the Quarter Sessions of the proper county his, her or their petition, at least three weeks before the first day of the session of the Court at which the same is to be heard, and shall, at the same time, pay said clerk $5 for expenses connected therewith; and said clerk shall cause to be published two times in three newspapers designated by him, one of which may be printed in the German language, a list containing the names of all such applicants, their respective residences, and the place for which application is made; and the cost of publication shall not exceed the usual rates charged by such newspapers; the first publication shall not be less than 15 nor more than 25 days before the time fixed by the Court; provided, the amount to be paid for such advertisement shall not, in the aggregate, exceed the $5 provided in this section to be paid by such applicant for expenses;" that there were 1,076 applicants for licenses at that term of the

Court, and the Appellant received from them $5,380; that he retained the said sum and refused to pay it into the County treasury, for the reason that the Act of Assembly created the money thus collected as a special fund for the expenses of advertising and his own legal expenses incident thereto, and that after paying all expenses out of the fund made up from the said $5 paid by
262 each applicant, the balance remained due to him and was not an earning of the fees under the meaning of the Salary Act of 1876, but was in the nature of a special fee for special services rendered.

Under this statement of facts it was agreed that the Court should decide whether the fees belonged to Shoener or to the County, and enter judgment accordingly, each party reserving the right to appeal to this Court from the judgment to be so entered. On Dec. 22nd, 1902, judgment was entered on the case stated in favor of the County of Schuylkill for $5,380, the amount of the license fees collected. On Jan. 3rd, 1903, as already stated, the information was made against the Appellant on which this indictment was found. On Jan. 9th, 1903, less than three weeks from the time the judgment was entered, the Defendant appealed to this Court and on May 4th, 1903, the judgment below was affirmed; Schuylkill County *vs.* Shoener, 205 Pa., 592.

By the decision in that case it was judicially determined that the license fees collected by the Appellant belonged to the County of Schuylkill. After notice from him that he was retaining these fees for judicial determination as to who owned them, the County agreed with him that the question of ownership should be determined not only by the Court below, but by this Court. It is true, as stated in the opinion of the Superior Court, our decision did not change the law as to the ownership of the fees; it simply announced the law to be that the fees never belonged to the Defendant, but were the property of the County of Schuylkill from the time that he received them; and, therefore, as held by that Court, his mistake as to the law did not relieve him from responsibility.

The Appellant has been acquitted of embezzling and converting the moneys to his own use and convicted of failing to pay them over when legally required to do so on demand made. The only demand ever made on him to pay over was a letter of the
263 Controller of Dec. 30th, 1902, if it is to be regarded as a demand within the meaning of the statute. It was made at a time when the determination of the question of the ownership of the fees was pending in the Courts by agreement of the County of Schuylkill, the only party entitled to them if they did not belong to the Defendant. It was competent to make such an agreement. How could any demand have been made at that time that the Defendant was bound to heed? It was his right to ignore it, and in doing so a sufficient answer to the County making it would have been, "You have agreed that the Court shall first determine to whom these moneys belong before I am called upon to pay." In the Civil Court the liability of the Defendant could not have been enforced until it was first fixed and determined in accordance

with the agreement between the County and Shoener, and, in a Criminal Court, where every presumption is in favor of innocence and the criminal statutes are to be strictly construed, how can it be pretended that the Appellant had criminally failed to pay over on demand? The failure to pay on demand, as contemplated by the statute under which he is indicted, is a failure to pay that which, at the time the demand is made, clearly belongs to the County making the demand and does not apply to a case where demand is made to pay during the pendency of the dispute as to who is entitled to the money, and which dispute, by the agreement of both parties to it, is pending determination in the Courts. If, in compliance with the notice received from the Controller, Shoener had paid over these license fees during the pendency of the qu-stion of their ownership, and it had been subsequently determined by the Court that they belonged to him, they might have been lost to him, for by such a payment his right to recover back would be very doubtful. In refusing to pay over at the time the alleged demand was made he did just what any other man, similarly situated and with a due regard to his rights, would have done; and it is a perversion of the 65th Section of the Act of March 31st, 1860, to
264 attempt to apply it to a case like this. The only evidence of a demand to pay over was the letter. This was written and received by the Appellant at a time when the County, by its own agreement, could not have enforced any civil liability against him, and in refusing to comply with the notice to pay he was standing on his right not to do so until it was determined that the County was entitled to receive the money.

The learned trial Judge charged the jury that the institution of the suit in the Common Pleas of the County was a legal demand for the payment of the money, and should be regarded as such demand in the prosecution of the Appellant on the counts charging him with failure to pay over on demand. In the Civil Courts constructive demands may be and are recognized, but not so in a criminal Court in the prosecution for an offense having as one of its statutory ingredients a refusal to pay on demand. A demand there means actual demand. The only actual demand that the Commonwealth pretends to have made was the Controller's letter. It was written after the institution of the civil suit and after the distinct agreement by the County that the question of the Defendant's liability should be judicially determined. Before being so determined there was no liability to be enforced against him civilly, and, therefore, no demand could be made upon him that he was bound to recognize. He has been acquitted on the counts charging him with a conversion of the public funds to his own use, and there was no evidence to sustain the conviction on the charge that he had failed to pay over after having been thereunto legally required on demand made. The 11th assignment complains of the error of the Court below in instructing the jury that there had been legal demand made upon the Defendant to pay over the fees. This assignment should have been sustained. If there had been proper instructions as to a legal demand the Defendant would have been acquitted on the counts

on which he was convicted. The remaining assignments
265 need not be considered.

The judgment of the Superior Court is reversed, as is that of the Court below, and the Defendant is discharged from his recognizance.

In addition to the above opinion Judge Mestrezat says: "I concur in reversing this judgment. I would go a step further than the opinion of this Court and hold that the Controller of Schuylkill County had no authority to make a demand upon Shoener for the payment of the fees, and hence there had been no demand made upon the Defendant prior to the institution of this prosecution as required by the Act of March 31st, 1860, under which the indictment was found. The proper officer to make the demand under this Act is the "person authorized to demand and receive the same." It is conceded that the Controller had no authority to receive the fees from Shoener, and it logically follows that the Controller is not the proper officer to make the demand upon him for their payment. This is a criminal proceeding, and the statute authorizing it should be strictly construed."

266 In the Court of Quarter Sessions of the Peace in and for the County of Schuylkill.

No. 905, September Term, 1905.

COMMONWEALTH OF PENNSYLVANIA
v.
JOHN T. SHOENER.

Embezzlement.

Charge of the Court.

Hon. O. P. Bechtel, P. J.

(Sept. 8, 1905.)

GENTLEMEN OF THE JURY:

Before we instruct you on the question of guilt or innocence in this case, we think and believe, after a most patient and careful investigation and careful reflection, that we are called upon, in the discharge of our duty, to dispose of the question of former acquittal, that is, of the defendant's plea of former acquittal. In this very case the defendant filed a plea setting up that he has heretofore been acquitted of the offence with which he is now charged, by reason of the existence of a record in the quarter sessions against him, in which he was previously tried. To this plea the Commonwealth filed a demurrer, denying that the record was sufficient to establish such alleged fact. We believed and still believe that, under
267 these circumstances it was our duty to examine the record of both the present case and the previous case, and anything

that was before us in the shape of evidence on that plea, and determine whether or not it showed that this defendant had ever been either acquitted or convicted of the offence with which he is now charged. We arrived at the conclusion that the offence named in the previous or first indictment and the offence named in this indictment were two separate and distinct offences, and we so stated, and directed judgment to be entered in favor of the Commonwealth, after which you were selected as the judges between the Commonwealth of Pennsylvania and this defendant, and again the defendant offered in evidence the same record, having again set up as part of his plea that he had formerly been acquitted, notwithstanding the fact that the record showed the judgment of the Court on the evidence presented, to the contrary. Possibly the Court would have been right if it had rejected the offering of this record, upon the ground that it had already been adjudicated in this very case, upon pleas that were competent and regular, but we felt if there was any other evidence in the possession of the defendant, which he could offer in addition to that record, that would tend to show that he ever had been heretofore tried for this crime, that he should have every opportunity possible to present it, and hence we allowed the record to be given in evidence, and permitted any evidence to be offered that the defendant might have, tending to show that he had already suffered for this alleged offence, or that he had been acquitted, which ever of the two positions he might see proper to take.

Now we have before us nothing excepting the very same
268 record, the same indictment, same record; I do not know of any other testimony offered in this case that affects that record, excepting that which appears in the record, and comparison with the record in this case——

Mr. REILLY: I would call your Honor's attention to the fact that the Commonwealth's own evidence shows, in the statement of the defendant accompanying his return to the Controller, filed in January, 1903, offered by the Commonwealth as evidence to show the moneys in the hands of the defendant, that they were the same identical moneys that were set out in the former indictment, and that was the reason that we did not offer any evidence.

The COURT: I take it that in part the money spoken of in the previous indictment and the present indictment refers to the same collection of license moneys, or moneys for transfers; and it forms, possibly, a part of the money that is now mentioned in this indictment, but anything that was before the Court before, contained in the indictment (and we had the record before us), does not change anything which is the indictment now, so far as it names an amount and specifies for what purpose it was given. Now under these papers I have presented to me the opinion of the Supreme Court right in this case, between the Commonwealth and this defendant, when the previous indictment was before the Supreme Court. The Supreme Court there say that there was no right in the Controller, or the County, rather, to demand any money from this defendant before the civil suit had been decided, and at the time that that de-

mand was made in December, 1902, the civil suit was pending undetermined. Therefore it reversed the action of the previous
269 trial, because no crime had been committed when he was tried. I have given that opinion the most careful consideration I am capable of giving, and I always cheerfully yield obedience to the instructions of our higher courts, for I believe that the liberties and rights of property and life depend upon the honest adherence to the rulings of the judicial branch of our government, and it is my ambition to properly understand their rulings and keep them and carefully observe the same, without regard to consequences either way. Therefore, after such examination, I am led to this conclusion, that when that opinion was filed in the Supreme Court of Pennsylvania, and subsequently here, and the proceedings of the previous trial were reversed, there was no crime that this defendant was called upon to answer for, because the Supreme Court declared that the demand that had been made upon him was illegal, had no right to be made, and he was not bound to obey it, and therefore not bound to pay over the money when they called on him in December, 1902, because the County had no right to call on him then for this money, but they were bound to wait until after the Supreme Court, as well as this court, decided the question of whether or not he had any claim or right to that money. They did decide that subsequently, and they said in their decision that he had no right to any of the money; that it belonged to the County of Schuylkill, like the other fees of the office he held.

Now, gentlemen of the jury, under this state of facts I come to the conclusion that there was no crime to try when he was tried before; that the crime that is now tried in this indictment exists only since the actual demand was made, which the language
270 of that Supreme Court opinion requires to be made before he is required to pay over. Justice Brown says, "We may recognize a judgment as a constructive demand in a civil proceeding, but not so in a criminal case, where a party is called upon to pay over when legally thereunto required." That is the language of Justice Brown, and it is the language of that Act of Assembly. For these reasons I am led to the conclusion that the offence we are now trying is not the offence for which he claims to have heretofore been tried, and consequently that his plea of former acquittal cannot be sustained upon anything that is before us. Under these circumstances, and in view of what has already occurred in this case, to which I have referred, I esteem it as my duty to say to you that you should find in favor of the Commonwealth on the issue of former acquittal; in other words, I direct that to be your verdict, as being a proper and required discharge of duty upon my part, and the Clerk having taken that verdict, I will then address you on the question of guilt or innocence, and whatever other questions are raised.

Mr. REILLY: I would like to call your Honor's attention to the fact that the record shows that this same evidence to which I referred, in the statement accompanying the return to the Controller, was

ered in evidence on the former trial, and I now ask for an exception your Honor's ruling, and that a bill be sealed before verdict.

The COURT: Certainly, we will grant*ed* you an exception. You ll have every opportunity of questioning anything we may say or do in the matter, in the higher court.

1 Before verdict, counsel for defendant excepted to the foregoing charge of the Court, and requested that the same, together with the testimony in the case, be transcribed from the nographer's notes and filed of record.

Granted. Bill sealed.

The jury then rendered the following verdict: "On the issue of mer acquittal, we find in favor of the Commonwealth."

The COURT: Now, gentlemen of the jury, you will understand, reason of this is, there were two issues before you, one of ether or not this party had been convicted heretofore, and another to whether or not the defendant is guilty of the offense with which is charged. We have disposed of the one, by this action on the part the court, in which we have given to these parties, to the commonwealth and this defendant, the best judgment we are capable giving, after a most careful consideration of the rulings of our her court in this case.

Now we come down to the question of the charge contained in this dictment, and the question of the evidence presented upon both es, and also the question of whether or not it is barred by limitan, which is presented by the plea of the defendant. We will call ention, in the first instance, to the language of the act; it is not engthy extract; it is part of the section which defines the offense h which the defendant is charged. After enumerating the other nes which are said to be defined in this section, we have this guage: "or fail to pay over the same when thereunto legally required by the state, county or township treasurer or other

2 proper officer or person authorized to demand and receive the same." What? If he shall fail to pay over when thereunto ally required by the proper officer, which, according to the officer ned, is the treasurer. There is no difficulty in keeping that in nd, that he shall pay over "when thereunto legally required by the per officer."

The offense charged in this indictment is, that the defendant has his possession, as the commonwealth alleges, a large sum of public nds; that he has been allowed all the credits to which he is entitled, l that the Treasurer of Schuylkill County, the proper officer ned in this language that I read to you, made a demand on him t he should pay over this money; that he remained silent from t time to this, so far as the payment of the money was concerned, s demand having been made on the 30th of June, 1905, and refore, they say, he has violated the provision that I read to you, ause he has failed to pay over "when thereunto legally required," l consequently they say he is guilty of the offence named in this tion of our crimes act, which is this: "Every such act shall be med and adjudged to be an embezzlement of so much of said

money as shall be thus taken, converted, invested, used, or unaccounted for, which is hereby declared to be a misdemeanor."

Now we will direct your attention to the testimony; it is not very lengthy. We will start in with the admission made. It was admitted that this defendant was an official in 1900, from Jan. 1 down to Jan. 5, 1903 as Clerk of the Court of Quarter Sessions &c., gave bond, and that the bond was with proper security, and that he entered upon the discharge of his duties. That places him in office as an officer, authorized to perform the duties of an officer, and to receive the moneys belonging to the office.

273 Then you have the testimony of M. J. Muldoon, who testified that he was deputy under H. J. Muldoon, who was controller; that Shoener filed returns of liquor licenses and transfers in their office. At this point he was stood aside, and J. E. Kantner testified he is deputy controller; that the reports were filed Jan. 6, 1903, and he produced them. On cross-examination he says the report was for Dec. 1902, but there is a statement for each month; he said he found these among the papers in the office.

Then M. J. Muldoon testifies that Shoener filed that statement, having the paper before him, in our office. He was sworn to the statement. That paper is before you; you can have it with you when you come to consider what your verdict shall be, and from that paper it appears there is a balance at that time, or up to the time named in the paper, of $18,240. You will remember that that paper is sworn to by the defendant and confronts him here as an instrument made by himself, while he was an official, although he may not have been the particular person who did the writing. I mean made, in the sense that he adopts it and files it; made by himself when he was a public official, and it is made on his oath, and neither the Commonwealth nor anybody else has offered any proof to show that the amount named in that instrument was not correct on the day and at the time that he filed it in the office. We therefore have that amount as being the amount stated by him to be due to the county, as subsequently appears by the civil proceedings, which were finally determined in the higher court. That is, after the Supreme Court filed their decision in the case between the county and Shoener, they decided that this license money never belonged to Shoe-

274 ner; that it was the property of the county of Schuylkill, and under the Act of Assembly relating to the controller and the act relating to the salary law, this money was to be paid right into the treasury, and that parties who had claims against the county should assert them (in substance the decision so says) through the controller, in the way that other people who have claims against the county do.

Starting then with that amount as the admitted amount presented by the defendant on his oath, we follow the testimony given in after that. This paper and the other papers were shown to be regular. Then we have given in before you the statement of Dec. 31, 1901, for the year 1901; Dec. 31, 1900, for the year 1900, making the three years, including the other one.

Now you have the testimony of S. J. Deibert, who testifies that he

Deputy Prothonotary, and he identifies the suit No. 61 January
erm, 1902, County *v.* John T. Shoener, and the record is referred
; the record to that number was offered in evidence. It was carried
the Supreme Court, where it appears to have been No. 6 January
erm, 1903, and that it was there decided and a remittitur filed
ere, and what the balance was ascertained to be due, showing the
etermination of the Supreme Court that the money belonged to
e county, in the very case stated where the county and the de-
endant joined hands and asked for the opinion of the court, as to
ho owned that money.

Then you have the testimony of C. E. Depew, who says that he
deputy for the County Treasurer, and that he has a record of
e payments made there. He starts in with the payment in Jan.
1903 of $1436.35. Then he follows on down, Feb. 1, 1904
75 $3900; Feb. 3, 1904, transfer of liquor licenses, $1075; same
day, on debt, $43.65; same day $705; Feb. 5, $1051.35; Feb.
, $2690.02, from Feb. 1, 1902 to Feb. 1, 1903. Then he gives the
tal sum and then he says the total amount paid on everything
r license purposes is $11,001.72, and for that amount the Com-
onwealth gives credit to the defendant, and they claim the dif-
rence between that and the $18,240. making a difference of $7243,
d that is the amount which they say, back as far as the date of
ese payments, was due to the county of Schuylkill, and was de-
rmined to be due to the county of Schuylkill, as the property of the
unty of Schuylkill, when the Supreme Court, in May, decided
e civil suit between the county and Shoener, and decided that the
oney always belonged to the county and never belonged to the
fendant. This witness was cross-examined in relation to these ac-
unts and went on to repeat these amounts, and it is hardly neces-
r- to repeat them ag*ain*, and he said that all these items that he
ad were paid in cash. In the first place his impression was that
me of them were simply an exchange of warrants, but he said that
e money was paid in, and that the money that paid this debt off,
id off these warrants,—warrants were issued for these different
mounts named in the warrants, and that the total of them amounted
this and included an additional sum. Then we took down the
mbers of all these warrants, a long list, giving the amount of each
e, and also the party to whom they were made payable, when they
re issued, who endorsed them, and when we reached the end it
sulted in this, that all the money represented by these warrants
s drawn out of the treasury by John T. Shoener, and the total was
$12541 and some cents. Then he says the amount paid on the
6 license money was $11,001.72; he drew out $1539.35 more
than he paid in. Then he said that Reed brought this money
, in the course of this settlement, and that his name appeared upon
e papers; he seemed to be the representative of the attorney who
s the attorney for the Controller, at least he appeared there in some
pacity; and he says that all of these warrants were endorsed by
eed, excepting one, I believe, $187.35; but he again stated that
oener was entitled to a credit of $11,001.72 for moneys paid on
count of the license fees, and that the other was a settlement of

other matters in his office, arising out of previous entries or credits. That is, in substance, what this witness says, and of course you understand that if we do not refer to every word that he says, you are not thereby precluded from considering everything that he said on either side, now as to any other witness. You are to take all the evidence in the case that has been admitted before you, bearing upon the question of guilt or innocence, and determine what your verdict shall be.

Having gotten this far, that the amount the County asserts against Shoener is found upon this statement which he filed, and the credits as shown by the warrants here, we come to the remaining question, of demand. You have the testimony of F. J. Noonan, who says that he is County Treasurer and has been since January, 1903. He says he made a demand upon this defendant for $7243.28. That demand he said he made on the 30th of June, 1905, although the paper bears date a few days earlier. He explained that by saying he had no desire to go down to his house if it could be avoided, and he expected to see him here in town, but failed to do so, and finally concluded he must go there to serve it, and found him on the farm.

277 He served the paper by giving him the original and keeping a copy. That copy had attached to it a paper containing figures as to the amount of claim, and showing how that amount is made up. That paper comes before you as part of the original paper, and for the purpose of proving a demand made by the Treasurer of Schuylkill County, the officer named in the Act of Assembly, and also showing what it was that the Treasurer did demand. To that extent it is evidence. It is not admitted as evidence sworn to, because it would only be *ex parte*, and it was not necessary that it should be offered for that purpose, when it was only to show that a demand had been made, and it is evidence for just the purpose that we have indicated, to prove that a demand was made upon the defendant and what was demanded of him, to wit, $7243.28, and when it was demanded, to wit, June 30, 1905. Then there was some examination of this witness as to that paper and how it was made out and what it was and where it came from, but we will not take the time to refer to that, because we have limited its scope to the particular purpose for which it was admitted, and I do not think it would be profitable to either side to say any more upon that subject.

This was the evidence presented on the part of the Commonwealth, and then you have the testimony presented on the part of the defence; first, the record of the previous trial, which was presented on the plea of former acquittal, as I have already explained to you, and which has been disposed of in the action that has just been taken before we started to instruct you in relation to the question of guilt or innocence. In addition to that, we have a reference to No. 175, March Term, 1903, (No. 47 October Term, 1904, in the Supreme Court) an entry in relation to the case that was in the Supreme Court. Then there was special attention directed to the ver-

278 dict rendered in the other case, all of which is disposed of on the question of former acquittal, which we have already

disposed of. Then the testimony of Samuel Commings, a Tax Clerk, now warrant clerk. His evidence was dispensed with; there is little or nothing on the record, but whatever he has testified to, what has been admitted before you, you will consider along with all the other evidence in the case.

This, we believe, is a brief reference to all the testimony submitted in this case. As I have just said to you in reference to one of the parties, I will say in reference to all; whether we have mentioned it all or not, you will understand that you are to consider all the testimony on both sides.

We have given to us a number of points that we are requested to answer. We did intend to instruct you generally on the subject of limitation, in our general charge, but inasmuch as the defendant has presented a prayer for instruction upon that proposition, we will adopt that method of answering the question. He asks us to instruct you as follows:

1. That the law of this commonwealth, relating to public officers, required that the defendant, whilst clerk of the Court of said county, on the first Monday of each and every month during his term of office, and the first Monday of the month next after the expiration of his term, pay to the County Treasurer all fees received by him for applications for liquor licenses, and for the transfer of licenses for the preceding month, and to take duplicate receipts therefor, and deposit such receipts with the County Controller, together with a transcript in detail of his fee and account book for the preceding month, under oath, and it was his legal duty to do so; if the jury find from the evidence that said defendant failed to pay over to the County Treasurer said sum of $7243.28 mentioned in the indictment, or any portion thereof, as and when so required by law, to wit, the first Monday of January, 1903, the offense of failure to pay over
279 under this indictment was then and there complete, and it immediately became the duty of the County Treasurer to demand payment of the same, and his failure so to do could not stop the running of the statute of limitations in favor of the defendant, and their verdict should be "Not Guilty."

2. That the statute of limitations relating to such cases as this provides that all indictments for any such alleged crime or misdemeanor shall be brought or exhibited within two years next after such crime or misdemeanor shall have been committed, and not afterwards; and if the jury find from the evidence that the defendant, any time after the expiration of his term of office, the first Monday of January, 1903, had in his hands and failed to pay over $7243.28, license application and transfer money belonging to the county, or any part thereof, then demand by the County Treasurer could have been at once made, and the Commonwealth were bound to bring their indictment within two years from the time the County Treasurer could have so legally demanded payment of said money, and having failed to do so, as appears on the face of the indictment, the statute of limitations would be a bar, and their verdict should be in favor of the defendant, "Not guilty."

3. That the statute of limitations in this case began to run in favor of the defendant from the time the alleged crime was committed, which was, if at all, when the defendant failed to pay over to the County Treasurer the license money in his hands as required by Sec. 2 of the act of 31 March, 1876, P. L. 13, and not when or after the payment of the same was demanded by the County Treasurer June 30, 1905, and as the indictment shows on its face that it was found over two years from the time when the payment of said money could have been demanded, and indictment found, the verdict of the jury must be "Not Guilty."

4. That any agreement or stipulation entered into between
280 the county of Schuylkill and the defendant for the purpose of legally determining the legal ownership of said money or any part thereof in a civil proceeding in the courts of the state did not arrest the running of the statute in favor of the defendant, but the statute became a bar to this indictment in two years after the first Monday of January, 1903, when defendant's term of office expired and he failed to pay over, and the verdict must be "Not Guilty."

We will answer these four together. All these points bear upon the question of limitation, as to when it begins to run. We have indicated an opinion heretofore during the progress of this trial. Briefly stated, in misdemeanors limitation begins to run from the time the crime was committed, or in other words, from the time when a right of criminal action exists and a prosecution may be legally instituted. In this case, the 65th section of the act of 1860 requires the defendant "to pay over the same when thereunto legally required," and the Supreme Court say such demand must be an actual demand. Until, therefore, he was required to pay over, until such actual demand was made, there was no crime committed. The evidence shows, he was so required to pay, on the 30th of June, 1905, and by an actual demand in writing, and hence we hold that to be the period from which the statute began to run, for the statute cannot begin to run in bar of a prosecution before the right of prosecution exists, and consequently we refuse these points.

5. That the records in evidence and the indictments show that the defendant was previously indicted for the same offense charged in this indictment, and with failure to pay over the identical money with which he is charged in this indictment, as having failed to pay over, and was duly tried and acquitted by a jury of his peers and the law of the land, and he cannot be held to answer a second time for the same offence, and their verdict must be "Not Guilty."

281 Answer. To that we say, we cannot so instruct you, and we therefore refuse this point. I will read the sixth point, to which this is also an answer.

6. That the Act of Assembly under which the present indictment is found does not apply to such a case as this, but exclusively to public officers while in office or a reasonable period afterward, and as this indictment was not found until September 4, 1905, two years and eight months after the defendant's term of office expired, it cannot be maintained and the verdict must be "Not Guilty."

Answer. We have written the same answer to both of these points; at is, we cannot so instruct you, and therefore refuse these points; nd I will add, as to the sixth point, that I cannot understand how would be possible to enforce such a position, when he goes out of lice, the Clerk of the Court (I am speaking generally) makes a turn the following Monday, as stated in one of these points, and e County of Schuylkill, if the statute of limitations began to run that time, would hardly be able to make a demand on him before got out of office; and yet they seem to maintain that the demand ust be made while he is in office, or a reasonable time thereafter. ow what is the reasonable time? We are remitted right back to e other proposition.

7. If the jury have any reasonable doubt of the guilt of the de- ndant, under the law and evidence of the case, they must give e defendant the benefit of such doubt and render a verdict in s favor of "Not Guilty."

Answer. We affirm that, and we will speak about that later on.

8. The gist of the offence in this charge is that of conversion, and the defendant in this case, John T. Shoener, went out of office on the first Monday of January, 1903, and was contending at 2 the time he was in office and the time he went out of office, that the moneys alleged to have been embezzled in this case re his under the Act of 1897, and that the question was not de- mined until May 11, 1903, more than two years and three months ior to the finding of this indictment, it being conceded that the tute of limitations is two years, under Section 65 of the Criminal de of 1860, under which he is indicted, the defendant cannot be nvicted.

Answer. We say this. This point asks us to direct you to acquit e defendant. We cannot give you such instructions from any- ng before us in this case, and we therefore refuse this point.

9. It having been held by the Supreme Court at the former al that the suit in the civil proceeding was no demand as was ntemplated by Section 65 of the Act of 1860, and that no demand s made as was alleged in the indictment, but it having been de- mined on May 11, 1903, in the civil proceeding, that the moneys onged to the County and not to the defendant, the conversion, any there was, took place immediately following the decision the Supreme Court, May 11, 1903. And if the Commonwealth glected for a period of two years, one month and nineteen days er the civil liability of defendant was determined, to make a mand, and for over two years and three months after the civil ility was determined, to find the indictment in this case, then defendant cannot be convicted, as the statutory period of two rs ran before either there was a demand or the indictment was nd.

Answer. We think this is answered in what we said to you in wer to points numbers one, two, three and four, and we refer to that which we then said, as an answer to this point.

Now, gentlemen of the jury, on the question of limitation you from what we have just said to you, that it does not bar this

action, so far as the Court rules. It is my duty to rule the
283 law as well as I know how. I have done it with the best light I possess. It is your duty to receive the instructions from the Court as to the law, as being the best evidence of the law. We have submitted it to you, and say to you that we are led to the conclusion, for the reasons that I read to you, which I have written out, that limitation does not bar this prosecution, and we so instruct you.

You now have left the question of guilt or innocence, reasonable doubt, and such matters as arise from an ordinary criminal case. Take into consideration the evidence that has been presented here, the statement of Shoener, the credits allowed by the County, and the balance ascertained, and ascertain whether that is the correct balance from the evidence that you have before you. Does he have that amount of money in his possession, belonging to the County? If he does, was it demanded of him in a legal way, in writing, specifying the amount, and by the Treasurer of Schuylkill County, as required by this Act? If so, and you are satisfied of these things, has he failed to pay it over? If he has, then we think the offense is made out, and you would be justified in convicting him in manner and form as he stands indicted. If it is not, he should not be convicted. That is a question for you to determine under your oaths and all the evidence you have before you, after a fair, honest and impartial consideration.

The defendant is entitled to the benefit of any reasonable doubt that may exist, arising out of the evidence before you, as to whether he is or is not guilty, or as bearing upon the question of guilt or innocence. If such doubt exists, he should have the benefit of it, as I have already stated to you and also affirmed in the point; but it must be a reasonable doubt and it must arise out of the evidence before you, after an honest consideration of the same. If no such doubt exists, then it is your duty to convict, because in such case the crime is made complete.

If you acquit, you must dispose of the costs, because this
284 crime is not a felony, as seems to have been supposed; the Act of Assembly says it is a misdemeanor.

Mr. REILLY: No.

The COURT: Anyhow, it is a misdemeanor, whether anybody said that or not, the Act says so, and in misdemeanors, if you acquit the defendant it is made your duty to dispose of the costs. You have the power to place them on the prosecutor or on the County, or on the defendant; you have the power to divide between the prosecutor and the defendant in any proportion you see proper, stating what amount each one should pay. The County cannot be made a party to any division; you must either put all the costs on the County or none; and if you convict him, you say nothing about costs.

Before verdict, counsel for defendant excepted to the charge of the Court and answers to points, and requested that the same, together with the testimony in the case, be transcribed from the stenographer's notes and filed of record.

Granted. Bill sealed.

Endorsement: No. 905, Sept. T., 1905—Commonwealth *vs.* John T. Shoener—Charge of the Court—Oct. 21, 1905 filed, O. P. B.—H. C. Wilson, Asst. Atty.

285 *Verdict Guilty. Rule for New Trial.*

THE COMMONWEALTH
vs.
JOHN T. SHOENER.

The defendant was convicted under the 65th section of the Crimes Act of March 31, 1860, Purdon 500 pl. 181, of failing to pay over moneys in his possession as Clerk of the Court of Quarter Sessions, when thereunto legally required by the proper officer, to wit, the County Treasurer. Upon his trial he offered as his defence, first, that he had formerly been acquitted of the same offence, as the result of a previous trial, and second, the statute of limitations. To sustain these pleas he presented the record of his former trial. An examination of this record shows in the language of the Supreme Court that, "the 1st, 2nd, 3rd, 5th, 6th, 7th, 9th, 10th and 11th counts charged him, in the language of the 65th section of the Act of March 31st, 1860, with having embezzled and converted to his own use the license fees collected by him during his term. The 13th charged him with embezzlement of the fees paid on applications for the transfers of licenses. The jury acquitted him of these counts. The 4th, 8th and 12th charged him *simply* with having failed to pay over the license fees 'when thereunto legally required by the County of Schuylkill or its legally authorized officers to the Treasurer of the county of Schuylkill, he being the proper officer authorized to demand and receive the same.' The result of the trial then was an acquittal of the defendant on the charges of converting license fees to his own use, and a conviction of having failed to pay them over, under an allegation that demand had been made upon him to do so." The foregoing quotation is from the opinion of the Supreme Court in disposing of the former case. We give it here to show just what that court understood, in relation to what the indict-
286 ment then charged. It shows that neither of the nine counts charged the defendant with failing to pay over, as now claimed by his counsel, and that the four charged him with failing to pay over only. And this we think is the plain reading of the thirteen counts of the former indictment. If the contention of defendant's counsel, that some of the nine counts of which he was then acquitted, charged defendant with failing to pay over, be correct, then we have the singular result in that trial, that the defendant was *both convicted and acquitted of the same offence, in the same verdict.* We are persuaded the Supreme Court would have entered a different judgment under such state of facts. This we think appears from its action in Commonwealth *vs.* Weiderhold, 112 Pa. st. 584, in which the first and second counts charged the defendant with practically the same offense, and the jury acquitted of the first, and convicted of the second, and the Supreme Court arrested the

judgment; thus finally terminating the proceeding. We cannot therefore accept the conclusion of defendant's counsel that by virtue of the acquittal of the nine counts defendant had been acquitted of the offense charged in the present indictment. The judgment of the Supreme Court, which is a reversal of the Superior and this Court, is readily understood by simply keeping in mind the conclusion arrived at, in the learned opinion of Mr. Justice Brown to wit: *that no offence had been committed* at the time of the previous trial. Of course there was nothing to try, and consequently *nothing of which the defendant could either be convicted or acquitted.* Reversing the conviction, and discharging the defendant from his recognizance, left the parties just where they were, before the first prosecution was instituted. The jury could no more acquit than they could legally convict of a crime *that had never been committed,* and hence had no legal existence. The defendant says the reversal is based on insufficiency of evidence, certainly the evidence was insufficient but the missing link was that which would have proven the existence of the crime, for which he was tried. To illustrate,
287 suppose a defendant were put to trial for murdering "A," and the Commonwealth failed to prove "A" had been murdered, and in point of fact "A" appeared in the Court room during the trial, thus demonstrating he had not been murdered. We contend no possible verdict the jury could render would avail the defendant, if in point of fact he murdered "A" the following week. Suppose the jury convicted notwithstanding this want of evidence, the Supreme Court reversed because the crime had not been proven to be committed, and there we would have just the facts presented here. That is a charge of murder, the same crime, against the same defendant, and of murdering the same person, and a reversal because the evidence did not show the crime had been committed. Now would anyone pretend that the defendant could not be put to trial, because of the former trial? Can the record of the former trial save him from the consequences of the crime he subsequently committed? It seems unnecessary to pursue this branch of the case any further. We cannot believe that the plea of former acquittal or former conviction can be sustained by the record of the former trial. If after the judgment of the Supreme Court the Commonwealth desired any further proceeding it was necessary it should start anew. Accordingly on the 30th of June, 1905, an actual demand in writing was made calling upon the defendant to pay over the moneys which he held for the use of the county of Schuylkill. The offense — which the defendant is charged, the *Supreme Court* says, has, "as one of its statutory ingredients a *refusal* to pay on demand." The demand required by the 65th section of the crimes act is an actual demand, say the Supreme Court. *That actual demand is just as much a part of the crime as is the failure to pay over after such actual demand.* Hence until the demand was made and followed by a failure to pay over the crime charged in this present indictment was not complete, and no right to prosecute existed. If there is anything conclusively determined, touching the statute of limitations, it is that
288 it can never begin to run before a right of action exists.

The right to prosecute did not exist in this case prior to June 30, 1905, hence the statute could not begin to run against that right prior to that time. It follows therefore that the crime for which the defendant was tried was not barred, whether the period of limitation be two or four years. If we are correct in this conclusion, both the defendant's pleas must fall, for it is just as impossible that he should be *acquitted* of the offense before it is committed as that *the right to prosecute* should be barred *before* it existed. It is a well settled rule in our civil courts, that *whenever demand* is necessary to a right of action, limitation does not begin to run, until after such demand. Ordinarily suit is a sufficient demand, and must be brought within six years, but when demand is necessary to a right of action, limitation cannot begin to run until after demand. This subject was most carefully considered, and all the authorities reviewed, in the learned opinion of Chief Justice Mitchell, in Cook *vs.* Carpenter Ad. Rep. October 13, 1905, page 165 (212 Past). If it be the rule in civil cases, why not in criminal cases? We therefore consider this plain statement of facts an answer to both his pleas. There is no dispute as to what the record of the former trial contains, and hence no dispute as to what the evidence upon the subject of former acquittal is, and under the circumstances, the question may be determined by the courts directing the verdict of the jury, or upon demurrer to the defendant's plea. The authorities seem to recognize either, while in this case both methods have been pursued. As showing that both methods are recognized we cite Comlth. *vs.* Tadnicke, 1 S. C. 555; Comlth. *vs.* Rockafellow, 3 S. C. 588, Comlth. *vs.* Hazlett, 14 S C. 353, also 16 S. C. 534; Comlth. *vs.* Zepp, 3 Clark 311; Comlth. *vs.* Trimmer, 84 Pa. st. 65; Solliday *vs.* Comlth. 28 Pa. st. 13; Hiland *vs.* Comlth. 114 Pa. st. 372; Comlth. *vs.* Brown, Adv. Rep. Oct. 20, 1905, p. 296 (28 Sup. C. R.),
289 and Altenberg *vs.* Comlth. 126 Pa. st. 602. Nor can the defendant justly complain, that limitation begins to run from the time of actual demand, what injury does he thereby suffer for he is *not liable to prosecution until such demand has been made, and he fails to pay over.* In discussing this subject it is well to bear in mind, that the defendant was a public county official, so recognized by the Constitution of the Commonwealth as well as by our acts of Assembly, and as such and such alone he received the moneys he now holds and still refuses to pay over. To show just how he holds the moneys in question, we quote from the salary act of 1876 P. L. 13, as follows, to wit: "All fees limited and appointed by law to be received by each and every County officer therein elected by the qualified voters of their respective counties or appointed according to law, or which they shall legally be authorized, required or entitled to charge or receive shall belong to the county in and for which they are severally elected or appointed, and it shall be the duty of each of said officers to exact, collect and receive all such fees *to and for the use of their respective counties* except such taxes and fees as are levied for the state, *which shall be to and for the use of the state.*" This is followed by a provision prohibiting the receipt of money by such officers for their own use,

Does he not really hold the money in trust for the county, and were it state money, would he not really occupy the same relation to the state? In contemplation of law he is ever and always ready to pay over upon legal demand, and why should *he* complain that demand was not made earlier. Failing to make demand at an earlier period did not subject the defendant to any new or other liability or responsibility. He still held the money, in precisely the same way "to and for the use of the county." Indeed there are numerous instances in the civil side of the court, in which parties holding moneys in trust or as trusties, may not interpose the plea of statute at all. See "Limitations of Action" Brightly's Digest page 2315, P. L. 212 and the cases there cited. The defend-
290 ant contends that limitations began to run from the time he should have paid over under the act, or at the farthest from the time when the Supreme Court decided the civil suit, May 11, 1903. If this were a suit in the civil side of the Court, to recover the money, we could understand this contention. In that court suit could be instituted without an express or actual demand, the righ- of action being complete without an express actual previous demand, which could be barred if at all, only after six years. But a failure to make the reports required by the act, and pay over as therein directed, does not in itself under the opinion of the Supreme Court, complete the Crime of "failing to pay over when thereunto legally required." Something more is necessary, to wit, an actual demand followed by a failure to pay over after which alone limitation can begin to run. If the defendant means, that the *right to make the demand,* may be barred, then we say, the right in the county's fiscal officer, to demand the money, is a civil right and if it may be barred by the statute of limitations, it is not governed by the two or four year period of limitation but by the Six year period, applicable on the civil side of the court. For these reasons we are of the opinion that the right to prosecute is not barred whether the period be two or four years. During the trial the Commonwealth stated, it did not claim the period of limitation was four years, but claimed it began after the demand June 30/05, as will fully appear from the record. Of course no claim or agreement of the Commonwealth, can alter or change the period of limitations as fixed by law, whether in Criminal or Civil Courts. Should it become necessary to definitely determine the period, then we think the Sixth Section of the act of 1878, is well worthy careful consideration. The defendant contends the act of 1878 is unconstitutional because it offends section 6, Article 3 of Constitution. It is true the 1st, 2nd, 3rd, 4th sections of the Act of 1878 purport to be amendment to section 116, 117, 118, and 119 of the Act of
291 March 31, 1860, and said sections are not set forth in said act. It would therefore seem to come within the ruling in Barrett *et al.* Appeal 116 Pa. St. 486, and for the purposes of this case we do not contend to the contrary, so far as said four sections are concerned. But how about the 6th section? It does not purport to be an amendment to any act, it says, "indictments for misdemeanors committed by *any officer,* director, receiver superin-

tendent, manager, broker, attorney, agent, employé or member of any bank, body corporate or public company, *municipal or quasi municipal corporation* may be commenced and prosecuted at any time within four years from the time the alleged offense shall have been committed" P. L. 1878, p. 197. This is general in its terms and if it stands, it changes the period found in the 77th section of the Act of March 31st, 1860. Why may not this section stand though the others fall? If there be any doubt as to the constitutionality of an act, it must be resolved in favor of the act. All presumptions are in favor of the constitutionality of an act of Assembly. It is only in clear cases that courts are justified in declaring an act unconstitutional. Craig *vs.* Church, 88 Pa. 46. Comlth. *vs.* Wolff, 99 Pa. 535. As the 6th section of the Act of 1878 does not undertake to amend any particular act, there was no need to repeat the terms of any act. Article 3, section 6 of the constitution relates to amendment of acts, or rather applies only to express amendments. Searight's Estate, 163 Pa. st. 210. See also Gallagher *vs.* McLean, 193 Pa. st. 583., and Borough *vs.* Biddle, 201 Pa. st. 96. That one part of an act may be unconstitutional and the other part stand has been decided. See Cooley on Constitutional Limitations 178, Comlth. *vs.* Green, 58 Pa. st. 235. The remaining question is, does this section cover the defendant's case? We are not without authority upon this subject. In Culp *vs.* Comlth. 109 Pa. 363, the defendant was a clerk in the office of the Trustees of the Gas Works of Phila. He collected moneys and embezzled the same, he was indicted but not within two years from the time the
292 offense was committed though within four. The four year period of the 6th section of the Act — 1878 was invoked, and in an able opinion P. J. Hare decided, that the defendant though but a clerk to the trustees, who were but officers of the Gas Works, was nevertheless an employé of the City, and then showed that a city is a municipality and hence the defendant was within the 6th Sec. of Act of 1878. This decision was affirmed by the Supreme Court, and in the opinion the term municipality is defined. Now a County is a municipality, and "Clerks of the Courts" are County officers, under Article 15, Section 175 of the Constitution. Why then is not this defendant within the term "Any officer," * * * of any body corporate or "municipal or *quasi* municipal corporation." Is he not a much more important officer than a mere clerk appointed by trustees of gas works? We fail to find any reason for disturbing the verdict, though we have given most careful consideration to every question presented. A word as to the evidence, the defendant in pursuance of the requirements of the Controller and Salary Acts, filed with the Controller returns. On the 6th of January, 1903, he filed a report *under his oath* showing that he had received $18240. From liquor licenses, the county allowed him $1101.72 credit, as against this and specified what it is that makes this sum. So that he had full knowledge of the items of credit allowed. This left a balance over Seven Thousand dollars for which demand was made June 30/05. This evidence stood before the jury uncontradicted. No evidence was offered to show that the defendant was entitled to any additional credit;

nor to give any reason for failing to pay over. The defendant did not testify in his own behalf, a matter that could not be referred to during the trial, but may be now, hence there was nothing save the above mentioned uncontradicted evidence before the jury. Unless now some technicality can be discovered to relieve the defendant, it is difficult to understand how he can escape such an overwhelming array of facts. Now can we as a court of justice, under these circumstances, believe it proper that even ques-
293 tionable, much less merciless technicalities, should be permitted to turn aside the course of justice?

And now Oct. 16, 1905, rule for new trial discharged, and new trial refused.

BY THE COURT.

Same day defendant excepts and court seals bill.

O. P. BECHTEL, [SEAL.]
Pres. Judge.

294 In the Supreme Court of Pennsylvania.

UNITED STATES OF AMERICA, *State of Pennsylvania, ss:*

I, Alex. K. McClure, Prothonotary of the Supreme Court of Pennsylvania, Eastern District, do hereby certify that the foregoing record, pages 1 to 298, inclusive is a true and faithful copy of the record and proceedings of the Supreme Court of the State of Pennsylvania, Eastern District, in a certain suit therein pending wherein John T. Shoener was appellant and The Commonwealth of Pennsylvania was appellee.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the said Supreme Court of the State of Pennsylvania, Eastern District, at Philadelphia the 27th day of November, 1906, and in the one hundred and thirty-first year of the Independence of the United States.

[Seal of the Supreme Court of Pennsylvania, 1776.]

A. K. McCLURE,
Prothonotary of the Supreme Court of Pennsylvania,
Eastern District.

295 I, James T. Mitchell Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, That Alex. K. McClure, was, at the time of signing the annexed attestation, and now is, Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 27th day of November one thousand nine hundred and six, 1906.

JAMES T. MITCHELL.

I, Alex. K. McClure, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, That the Honorable James T. Mitchell by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 27th day of November one thousand nine hundred and six, 1906.

A. K. McCLURE.

296 In the Supreme Court of the United States.

JOHN T. SHOENER, Plaintiff in Error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Assignments of Error.

Now comes the plaintiff in error, by Charles A. Douglas, his attorney, and submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Pennsylvania in the above entitled matter, there is manifest error in this, namely:

1. That the Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Quarter Sessions in and for the County of Schuylkill, sustaining the demurrer of the Commonwealth to the plea of *autrefois acquit* pleaded by the plaintiff in error, and in so holding is about to deprive the plaintiff in error of the rights, privileges and immunities guaranteed to him as a citizen of the United States by the provisions of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Quarter Sessions in and for the County of Schuylkill sustaining the demurrer of the Commonwealth to the plea of *autrefois acquit* pleaded by the plaintiff in error and in so holding is about to deprive the plaintiff in error of his liberty without due process of law and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Pennsylvania erred in affirming the order of the Court of Quarter Sessions in and for the County of Schuylkill directing the jury to find a verdict for the Commonwealth on the plea of *autrefois acquit* pleaded by the plaintiff in
297 error and in so holding is about to deprive said plaintiff in error of the rights, privileges and immunities guaranteed to him as a citizen of the United States in and by the provisions of the Fourteenth Amendment of the Constitution of the United States.

4. The Supreme Court of Pennsylvania erred in affirming the order of the Court of Quarter Sessions in and for the County of

Schuylkill, directing the jury to find a verdict for the Commonwealth on the plea of *autrefois acquit* pleaded by the plaintiff in error and in so holding is about to deprive said plaintiff in error of his liberty without due process of law and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of Pennsylvania erred in holding that the proceedings in the case of the Commonwealth of Pennsylvania against John T. Shoener, No. 175 March Term, 1903, in the Court of Quarter Sessions in and for the County of Schuylkill did not constitute former jeopardy, and in so holding is about to deprive said plaintiff in error of the rights, privileges and immunities guaranteed to him as a citizen of the United States in and by the provisions of the Fourteenth Amendment to the Constitution of the United States.

6. The Supreme Court of Pennsylvania erred in holding that the proceedings in the cause of the Commonwealth of Pennsylvania, against John T. Shoener No. 175 of March Term, 1903, in the Court of Quarter Sessions in and for the County of Schuylkill did not constitute former jeopardy, and in so holding is about to deprive said plaintiff in error of his liberty without due process of law and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

7. The Supreme Court of Pennsylvania erred in holding that the plaintiff in error had not been twice in jeopardy for the crime charged in the indictment in this cause, and in so holding is about to deprive said plaintiff in error of the rights, privileges and immunities guaranteed to him as a citizen of the United States in and by the provisions of the Fourteenth Amendment to the Constitution
298 of the United States.

8. The Supreme Court of Pennsylvania erred in holding that the plaintiff in error has not been twice in jeopardy for the crime charged in the indictment in this cause, and in so holding is about to deprive the plaintiff in error of his liberty without due process of law and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

9. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Quarter Sessions in and for the County of Schuylkill that the plaintiff in error pay a fine of $7,243.28 and to undergo punishment in the Schuylkill County prison by separate and solitary confinement at labor for two years and six months from the 23rd day of October, 1905, and by so affirming said judgment is about to deprive said plaintiff in error of the rights, privileges and immunities guaranteed to him as a citizen of the United States in and by the provisions of the Fourteenth Amendment to the Constitution of the United States.

10. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Quarter Sessions in and for the County of Schuylkill that the plaintiff in error pay a fine of $7,243.28 and to undergo punishment in the Schuylkill County prison by separate and solitary confinement at labor for two years and six months from the 23rd day of October, and by so affirming is about to deprive

plaintiff in error of his liberty without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

WM. WILHELM,
CHARLES H. DOUGLAS,
Attorney- for Petitioner.

299 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania wherein John T. Shoener is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Associate Justice of the Supreme Court of the United States, this 3rd day of November, in the year of our Lord one thousand nine hundred and six.

(Signed) EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

300 Nov. 14, 1906, service of within citation accepted.

I. A. REED,
Dist. Att'y of Schuylkill Co.
SAM'L W. PENNYPACKER,
Governor of Penna.,
Nov. 27th, 1906.
HAMPTON L. CARSON,
Attorney General of Pennsylvania.
Nov. 27th, 1906.

Endorsed on cover: File No. 20,473. Pennsylvania Supreme Court. Term No. 508. John T. Shoener, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed December 3d, 1906. File No. 20,473.

SUPREME COURT, U. S.
FILED
OCT 10, 1907
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 161.

JOHN T. SHOEMER, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

CHAS. DOUGLAS,
WILLIAM WILHELM,
E. B. SPRINGER,
Attorneys for Plaintiff in Error.

Judge & Dervishire (Inc.), Printers, Philadelphia, Pa. C. 2576.

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IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

This case is here on a writ of error to the Supreme Court of the State of Pennsylvania. Plaintiff in error contends that he was convicted in this case of an offense of which he had previously been acquitted, and that by being thus twice placed in jeopardy for the same offense he is deprived of his liberty without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution.

In November, 1899, the plaintiff in error, John T. Shoener, was elected clerk of the Court of Quarter Sessions of Schuylkill County, Pennsylvania, for a term of three years from the first Monday in January, 1900. He assumed

the duties of his office, and served during the full term for which he had been elected. His term of office expired January 5, 1903 (Rec., 158).

During his term as clerk, the act of the General Assembly of Pennsylvania passed July 30, 1897 (Pamphlet Laws, 469, 470), was in force, which provides as follows:

> "Every person intending to apply for licenses as aforesaid, under the provisions of this or any other act of Assembly, in any city or county of this Commonwealth, on and after the passage of this act, shall file with the clerk of the Quarter Sessions of the proper county his, her or their petition, at least three weeks before the first day of the session of the court at which the same is to be heard, and shall, at the same time, pay said clerk $5 for expenses connected therewith; and said clerk shall cause to be published two times in three newspapers designated by him, one of which may be printed in the German language, a list containing the names of all such applicants, their respective residences, and the place for which application is made; and the cost of publication shall not exceed the usual rates charged by such newspapers; the first publication shall not be less than fifteen nor more than twenty-five days before the time fixed by the court: *Provided*, The amount to be paid for such advertisement shall not, in the aggregate, exceed the $5 provided in this section to be paid by such applicant for expenses."

Under this law, the plaintiff in error received from applicants for liquor licenses during his term of office the sum of $18,245.

The laws of Pennsylvania require clerks of courts of quarter sessions, on the first Monday of each month, to pay to the county treasurers the fees received by them during the preceding month. Mr. Shoener kept an account of the money received by him from applicants for liquor licenses and made return of it to the county authorities. In his returns he stated that he had these moneys in his possession,

and held them for judicial determination as to whether they belonged to him or to the county (Rec., 158). He contended that moneys received from applicants for liquor licenses constituted an expense fund, wholly under the control of the clerk of the court for the purposes designated in the act, and that he was not required to turn them over to the county treasurer (Rec., 159, 160).

On November 20, 1901, the County of Schuylkill brought suit in the Court of Common Pleas against Mr. Shoener to test his right to retain these license moneys, and to recover the moneys received by him on account of the license fees during the year 1900. The question was submitted for the determination of the court on a case stated (which was filed in court November 21, 1901, the day after the suit was filed), in which it was set forth that Mr. Shoener, as clerk of the Court of Quarter Sessions, had received during the year 1900, from applicants for liquor licenses, the sum of $5,380; that he retained said sum in his possession and refused to pay it into the county treasury, for the reason that the act of the General Assembly constituted the money thus collected a special fund for the expenses of advertising and his own legal expenses incident thereto, and that after paying all expenses out of the fund made up from the $5 paid by each applicant, the balance remained due to him, and was not part of the fees required to be turned over to the county treasurer within the meaning of the salary act of 1876. It was agreed that the court should decide whether the fees belonged to Mr. Shoener or to the county, and should render judgment accordingly, each party reserving the right to appeal to the Supreme Court of Pennsylvania from the judgment of the Court of Common Pleas (Rec., 159, 160).

On December 22, 1902, judgment was entered by the Court of Common Pleas on the case stated, in favor of the County of Schuylkill, for $5,380—the amount of the license fees collected by Mr. Shoener during the year 1900.

On January 9, 1903, Mr. Shoener appealed to the Supreme Court of Pennsylvania, and on May 4, 1903, the lat-

ter court rendered its judgment affirming the judgment of the Court of Common Pleas (Rec., 160).

On November 14, 1903, six months and ten days after the decision in the civil suit above mentioned, Mr. Shoener was indicted in the Court of Quarter Sessions of Schuylkill County, charged with embezzling all the moneys received by him from applicants for liquor licenses during the three years of his term.

The act under which he was indicted reads as follows:

> "If any State, county, township, or municipal officer of this Commonwealth, charged with the collection, safe-keeping, transfer or disbursement of public money, shall convert to his own use, in any way whatsoever, or shall use by way of investment in any kind of property or merchandise, any portion of the public money intrusted to him for collection, safe-keeping, transfer or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the State, county, or township treasurer, or other proper officer or person authorized to demand and receive the same, every such act shall be deemed and adjudged to be an embezzlement of so much of said money as shall be thus taken, converted, invested, used or unaccounted for, which is hereby declared a misdemeanor; and every such officer, and every person or persons whomsoever aiding or abetting, or being in any way accessory to said act, and being thereof convicted, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine equal to the amount of money embezzled."

The indictment contained thirteen counts. The first four counts covered the money received by Mr. Shoener during the first year he was in office; the fifth, sixth, seventh, and eighth counts covered the second year; the ninth, tenth, eleventh, and twelfth counts, the third year, and the thirteenth count was for certain moneys that he had received during all of the three years. The indictment will be found on pages 84 to 91, inclusive, of the Record.

The first, fifth, and ninth counts charged Mr. Shoener with converting the license money above mentioned to his own use, and with using it by way of investment in property and merchandise; the second, sixth, and tenth counts charged him with using it by way of investment in property and merchandise; the third, seventh, and eleventh counts charged him with converting it to his own use, and the fourth, eighth, and twelfth counts charged him with failing to pay it over on demand. The thirteenth was an omnibus count, charging Mr. Shoener with converting certain of the money to his own use, with using it by way of investment in property and merchandise, with failing to pay it over on demand, and with being a defaulter as to it.

In the fourth count Mr. Shoener was charged with having failed to pay over on demand the sum of $5,380 received by him from applicants for liquor licenses and for transfer of liquor licenses during the year 1900; in the eighth count he was charged with having failed to pay over on demand the sum of $6,565 similarly received by him during the year 1901, and in the twelfth count he was charged with having failed to pay over on demand the sum of $6,300 similarly received by him during the year 1902.

The trial began on January 4, 1904, and ended January 8, 1904 (Rec., 8). Plaintiff in error was acquitted on the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh, and thirteenth counts of the indictment, and convicted on the fourth, eighth and twelfth—the counts charging him with having failed to pay over the money on demand (Rec., 8, 161). These counts charged the offense in these words:

> "That John T. Shoener, * * * clerk of the Court of Quarter Sessions of Schuylkill County, * * * did by virtue of his said office * * * receive, collect, and take into his possession certain public moneys * * * and * * * did fail to pay over the same, when thereunto legally required by the County of Schuylkill or its legally authorized officers to the treasurer of the county of Schuyl-

kill, he being the proper officer authorized to demand and receive the same." * * * (Rec., 86, 88, 91.)

The only evidence offered of an actual demand made on the plaintiff in error to pay over the fees to the county was a letter from the comptroller of the county dated December 30, 1902—more than four months prior to the decision of the Supreme Court of Pennsylvania in the civil suit above mentioned (Rec., 159, 161). Notwithstanding that more than six months intervened between the decision of the Supreme Court, holding that the county was entitled to the license fees, and the finding of the indictment, there was no evidence that any demand whatever had been made upon Mr. Shoener for the license moneys during this period. The trial court held that the demand contained in the letter of the comptroller dated December 30, 1902, was sufficient, and further held, and so charged the jury, that the civil suit brought by the county against Mr. Shoener was a sufficient demand (Rec., 161). On appeal, the judgment of the Court of Quarter Sessions was affirmed by the Superior Court.

From the judgment of the Superior Court Mr. Shoener appealed to the Supreme Court of Pennsylvania. The latter court, on June 22, 1905, held (Rec., 178-162) that the trial court erred in holding that the civil suit brought by the county against Mr. Shoener was a sufficient legal demand, and also erred in holding that the comptroller's letter to Mr. Shoener dated December 30, 1902, constituted a sufficient actual demand. The court said that the demand in that letter was made at a time when the civil suit was pending in court by agreement, and before the right of the county to the funds had been determined, and that as no demand could have been made upon Mr. Shoener that he was bound to recognize, until the matter had been determined by that court, the demand contained in the comptroller's letter was premature and nugatory. The court found that no other evidence of actual demand was adduced (Rec., 161), although, as above stated, more than six months intervened

between the judgment of the Supreme Court in the civil suit and the finding of the indictment.

The court said:

> "He [plaintiff in error] has been acquitted on the counts charging him with the conversion of the public funds to his own use, and there was no evidence to sustain the conviction on the charge that he had failed to pay over after having been thereunto legally required on demand made. * * * If there had been proper instructions as to a legal demand, the defendant would have been acquitted on the counts on which he was convicted" (Rec., 161, 162).

Because there was no evidence in the case upon which the conviction could be sustained, the Supreme Court reversed the judgment of the trial court, and, without remanding the case for further proceedings, discharged the plaintiff in error from his recognizance (Rec., 158-162).

On June 30, 1905, eight days after Mr. Shoener was acquitted and discharged by the Supreme Court of Pennsylvania, F. J. Noonan, county treasurer, made a demand upon Mr. Shoener to pay to the county the sum of $7,243.28 (Rec., 8, 143), being the balance claimed to be due to the county out of the $18,245 of license fees received by Mr. Shoener during his term of office, after making allowances and deductions for advertising and for clerical services.

On August 30, 1905, a new information against Mr. Shoener was sworn out by A. J. Shortall, a representative of the Tax Payers' Association (Rec., 8, 78).

On September 4, 1905, a new indictment was found by the grand jury against plaintiff in error. This indictment contained but one count, in which it was charged that plaintiff in error, as clerk of the Court of Quarter Sessions, had received as fees for liquor-license applications, during the years 1900, 1901, and 1902, the sum of $7,243.28, and had failed to pay the same over to the county treasurer after demand made by him (Rec., 80, 81).

The indictment charges the offense as follows:

> "That John T. Shoener, * * * clerk of the Court of Quarter Sessions of Schuylkill County, * * * did by virtue of his said office * * * receive, collect and take into his possession certain moneys for fees as aforesaid, to a large amount, to wit, $7,243.28, * * * which said sum F. J. Noonan, the said treasurer, did on the 30th day of June, A. D. 1905, demand and require him, the said John T. Shoener, to pay over to him, the said treasurer, and the said John T. Shoener did unlawfully fail to pay over the same unto the said treasurer when thereunto legally required as aforesaid by the said F. J. Noonan, treasurer of the County of Schuylkill, he, the said F. J. Noonan, being the proper officer authorized to demand and receive the same" (Rec., 80, 81).

The money which it was alleged in this indictment plaintiff in error had failed to pay over to the county treasurer on demand was part and parcel of the same $18,245 which he was charged in the former case with having failed to pay over on demand.

On September 6, 1905, plaintiff in error filed a special plea of *autrefois acquit*, in which he stated that he had been formerly tried and acquitted of the charge against him. He set out in his plea the proceedings in the former case, and alleged that he was the same John T. Shoener named in the previous indictment, and that the sum of $7,243.28 mentioned in the present indictment was part and parcel of the moneys which he was charged in the former indictment with having failed to pay over on demand. The plea will be found on pages 100 to 109 of the Record.

On the same day on which the special plea was filed, the Commonwealth filed a demurrer to the plea (Rec., 109, 110).

On September 7, 1905, the court sustained the demurrer and overruled the plea of *autrefois acquit* (Rec., 111-114).

Thereupon the defendant pleaded that he had been theretofore lawfully acquitted of the same offense charged against

him in the indictment, and for further pleas pleaded the general issue and the plea of the statute of limitations (Rec., 114).

The trial began September 7, 1905, and ended September 8, 1905. To support his plea of *autrefois acquit,* the defendant introduced in evidence before the jury the record in the former case, and in connection therewith proved that he was the same person named in the previous indictment, and that the moneys embraced in the present indictment were part and parcel of the moneys mentioned in the fourth, eighth, and twelfth counts of the previous indictment (Rec., 147 *et seq.*).

On the question of former acquittal, the trial court, over the objection of the defendant, directed the jury to render a verdict in favor of the Commonwealth (Rec., 164), to which ruling defendants excepted (Rec., 165). The jury, in accordance with the court's direction, rendered the following verdict: "On the issue of former acquittal, we find in favor of the Commonwealth" (Rec., 165).

After the rendition of this verdict by the jury in accordance with the instructions of the court, the court proceeded to charge the jury on the whole case. The trial resulted in a verdict of guilty by the jury.

On September 8 motions for a new trial and in arrest of judgment were filed, both of which were overruled on October 16, and on October 23 the defendant was sentenced to pay a fine of $7,243.28 and to be imprisoned in the county jail for a term of two years and six months.

Plaintiff in error thereafterwards prosecuted an appeal to the Superior Court, which rendered its judgment March 12, 1906 (Rec., 67-73), affirming the judgment of the Court of Quarter Sessions. From the judgment of the Superior Court plaintiff in error prosecuted an appeal to the Supreme Court of Pennsylvania, and on June 27, 1906, the latter court rendered its decision (Rec., 29, 30), affirming the judgment of the Superior Court and of the Court of Quarter Sessions.

The case is now here on a writ of error granted by this court to the Supreme Court of Pennsylvania.

Assignment of Errors.

(1) The Court of Quarter Sessions of Schuylkill County erred in sustaining the demurrer of the Commonwealth to the defendant's plea of *autrefois acquit* and in overruling said plea.

(2) The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Quarter Sessions of Schuylkill County sustaining the demurrer of the Commonwealth to the defendant's plea of *autrefois acquit* and overruling said plea.

(3) The Court of Quarter Sessions for Schuylkill County erred in directing the jury to find a verdict for the Commonwealth on the defendant's plea of *autrefois acquit*.

(4) The Supreme Court of Pennsylvania erred in affirming the order of the Court of Quarter Sessions for Schuylkill County directing the jury to find a verdict for the Commonwealth on the defendant's plea of *autrefois acquit*.

(5) The Court of Quarter Sessions of Schuylkill County erred in holding that defendant has not before been in jeopardy for the crime charged in the indictment in this case.

(6) The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Quarter Sessions holding that defendant has not before been in jeopardy for the crime charged in the indictment in this case.

(7) The Court of Quarter Sessions for Schuylkill County erred in sentencing the plaintiff in error to pay a fine of

$7,243.28 and to be imprisoned in the Schuylkill County prison by separate and solitary confinement at labor for two years and six months.

(8) The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Quarter Sessions of Schuylkill County sentencing the plaintiff in error to pay a fine of $7,243.28 and to be imprisoned in the Schuylkill County prison by separate and solitary confinement at labor for two years and six months.

ARGUMENT.

Plaintiff in error was convicted in this case of an offense of which he had previously been acquitted, and we submit that by being thus placed in jeopardy twice for the same offense he is deprived of his liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

I.

Plaintiff in Error Has Been Twice Placed in Jeopardy for the Same Offense.

(1) *The First Case.*

On November 14, 1903, plaintiff in error was indicted in the Court of Quarter Sessions of Schuylkill County, under section 65 of the Act of the General Assembly of Pennsylvania of March 31, 1860 (*supra*), charged with embezzling all the moneys received by him for fees on liquor license licenses during the three years of his service as clerk of the Court of Quarter Sessions.

The indictment contained thirteen counts. The first, fifth, and ninth counts charged plaintiff in error with converting the license moneys to his own use, and with using it by way

of investment in property and merchandise; the second, sixth, and tenth counts charged him with using it by way of investment in property and merchandise; the third, seventh, and eleventh counts charged him with converting it to his own use; and the fourth, eighth, and twelfth counts charged him with having failed to pay it over on demand. The thirteenth was an omnibus count, charging plaintiff in error with converting certain of the money to his own use, with using it by way of investment in property and merchandise, with failing to pay it over on demand, and with being a defaulter as to it.

Only the fourth, eighth, and twelfth counts are involved in the present inquiry. The jury returned a verdict of not guilty on all the other counts, but found plaintiff in error guilty on the fourth, eighth, and twelfth—the counts charging the failure to pay over the license money on demand.

In each of these three counts it was averred that plaintiff in error, as clerk of the Court of Quarter Sessions, had received certain public moneys for fees on liquor-license applications and on applications for transfer of liquor licenses,

> "and did fail to pay over the same when thereunto required by the County of Schuylkill or its legally authorized officers to the treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same."

The language of the three counts is the same, except that the fourth count charges the failure to pay over on demand $5,380 received during the year 1900; the eighth count, the failure to pay over on demand $6,565 received during 1901, and the twelfth count, the failure to pay over on demand $6,300 received during 1902. Taking the three counts together, plaintiff in error was charged in the indictment with having failed to pay over to the county authorities on demand all of the money received by him on applications for liquor licenses and for transfers of liquor licenses during his entire term of office.

At the trial, to prove the averment of demand in these three counts, the Commonwealth relied on the proof of two facts, viz: (1) the institution and prosecution by the county of the civil suit above alluded to; and (2) a letter, containing a demand, written by the comptroller of the county to plaintiff in error on December 30, 1902—four months before the right of the county to the funds was adjudged by the Supreme Court of Pennsylvania in the civil suit. No other evidence of demand was adduced (Rec., 161). The Commonwealth evidently considered this evidence sufficient, and did not deem it necessary to offer proof of a demand made subsequent to the decision of the Supreme Court adjudging the right of the county to the funds, although six months and ten days intervened between the date of the decision and the date of the finding of the indictment. In view of the allegations of the indictment, it must be presumed that demand had been made after the decision in the civil suit, but the Commonwealth's attorney, deeming the demand in the comptroller's letter sufficient, rested his case on that.

The trial court concurred in the view of the Commonwealth's attorney, and instructed the jury that the evidence of demand adduced by the Commonwealth was sufficient. The receipt of the money by plaintiff in error having been proved, and the court ruling that the evidence of demand was sufficient, the jury, as above stated, returned a verdict finding plaintiff in error guilty on the fourth, eighth, and twelfth counts, and acquitting him on all the rest.

On appeal by plaintiff in error to the Supreme Court of Pennsylvania, that court held that the evidence of demand was insufficient—that the bringing of the civil suit was not sufficient because the statute required an actual demand; that the letter of the comptroller was not a sufficient actual demand, but was nugatory, because made previous to the decision in the civil suit by that court (May 4, 1903), and at a time when no demand could have been made on plaintiff

in error that he was bound to recognize. The court therefore held that the trial court had erred in holding that the evidence of demand was sufficient, and said that if there had been proper instructions as to a legal demand the defendant would have been acquitted on the counts on which he was convicted as well as on the other counts of the indictment. The court therefore reversed the judgment of the trial court, and, because the Commonwealth had not proved plaintiff in error guilty of the crime charged against him, directed that he be discharged.

There was no intimation of any lack of jurisdiction in the trial court or of any defect in the indictment. The trial court had jurisdiction of the offense and of the person; the indictment was sufficient in substance and in form. The conviction was erroneous, not because the indictment was invalid or because the trial court lacked jurisdiction, but solely because the Commonwealth had not proved plaintiff in error guilty of the charge of failing to pay over the license moneys on demand. The Supreme Court said that if proper instructions as to a legal demand had been given the defendant would have been acquitted on all of the counts of the indictment. The trial court should have directed a verdict for the defendant, but it having failed to do so, the Supreme Court proceeded to do what the trial court should have done, and directed that plaintiff in error be discharged.

The decision of the Supreme Court of Pennsylvania was rendered June 22, 1905.

(2) *The Second Case.*

On June 30, 1905, eight days after plaintiff in error was acquitted and discharged by the Supreme Court of Pennsylvania, F. J. Noonan, county treasurer, made a demand upon him for the sum of $7,243.48—being the balance then claimed to be due to the county out of the $18,245 received by plaintiff in error for fees on liquor-license applications

and on applications for transfer of liquor licenses during his term of office.

September 4, 1905, a new indictment was found by the grand jury against plaintiff in error. This indictment contained but one count, in which it was alleged that plaintiff in error, as clerk of the Court of Quarter Sessions, had received during the years 1900, 1901, and 1902, $7,243.28, for fees on liquor-license applications and on applications for transfer of liquor licenses, which F. J. Noonan, the county treasurer, on June 30, 1905, demanded and required plaintiff in error to pay over to him, and that plaintiff in error did

> "fail to pay over the same unto the aforesaid treasurer when thereunto legally required, as aforesaid, by F. J. Noonan, treasurer of the County of Schuylkill, he, the said F. J. Noonan, being the proper officer authorized to demand and receive the same."

It will not be denied that the money mentioned in this indictment constituted part of the $18,245 mentioned in the fourth, eighth, and twelfth counts of the previous indictment. The same identical offense is charged with reference to it, viz., the failure to pay it over on demand, and the charge is made in almost the same language. The fourth, eighth, and twelfth counts of the first indictment followed the language of the statute and alleged that plaintiff in error failed to pay over the money—

> "when thereunto legally required by the County of Schuylkill or its legally authorized officers to the treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same."

The second indictment alleges the date of the demand and names the county treasurer. It alleges that plaintiff in error failed to pay over the money—

> "unto the said treasurer when thereunto legally required, as aforesaid, by the said F. J. Noonan, treas-

> urer of the County of Schuylkill, he the said F. J. Noonan, being the proper officer authorized to demand and receive the same."

Plaintiff in error pleaded a special plea of *autrefois acquit*, in which he set out the proceedings in the first case, and alleged that he was the same John T. Shoener named in the first indictment, and that the money mentioned in the present indictment was part of that mentioned in the fourth, eighth, and twelfth counts of the previous indictment.

The Commonwealth demurred to this plea, and the court sustained the demurrer and overruled the plea. Plaintiff in error then put in a short form of plea of *autrefois acquit*, and in support of it at the trial proved the proceedings in the former case, and that he was the same person named in the two indictments, and that the money mentioned in the second was part of the money mentioned in the first. On this proof the court, over the objection and exception of plaintiff in error, directed the jury to find a verdict for the Commonwealth on the plea of *autrefois acquit*.

The trial resulted in a verdict of guilty, and plaintiff in error was sentenced to pay a fine of $7,243.28 and to be imprisoned in the county jail for a term of two years and six months. Plaintiff in error appealed in turn to the Superior Court and to the Supreme Court of Pennsylvania, both of which affirmed the judgment of the trial court.

(3) *The Double Jeopardy.*

The Constitution of Pennsylvania provides that—

> "no person shall for the same offense be twice put in jeopardy of life or limb."

This provision affords plaintiff in error complete protection against the present prosecution, because he has already been acquitted of the identical offense charged against him in the indictment in this case.

In the first case plaintiff in error was placed on trial before a court of competent jurisdiction, on an indictment fulfilling all legal requirements, both as to substance and form. The jury was empanelled and sworn. The Commonwealth proved the receipt of the money by plaintiff in error, but failed to prove any legal demand made by the county authorities upon him for it, although such demand might have been made at any time within six months and ten days before the finding of the indictment and presumably was made. The trial court, over the protest of plaintiff in error, erroneously instructed the jury that a demand made at a time when the county had no right to make it was a sufficient demand, and, acting upon this erroneous instruction of the court, the jury erroneously found plaintiff in error guilty. The trial court then proceeded to erroneously pass judgment upon this erroneous verdict, induced by its own erroneous instruction. By this concatenation of errors plaintiff in error stood convicted of and sentenced for a crime which there was no proof whatever that he had committed.

To extricate himself from the perilous situation in which he had been placed through no fault of his own, and against his protest, by the error of the trial court, plaintiff in error appealed to the Supreme Court of Pennsylvania. By long-settled practice, as well as by express statutory enactment, the power of that court over the decrees and judgments of inferior courts of the State is plenary. Where error is committed the Supreme Court is not compelled to remand the case to the lower court for a new trial, but it is given power in such case to itself do what the trial court should have done. By the act of the General Assembly of Pennsylvania of May 20, 1901, it is provided as follows:

> "The Supreme Court shall have power in all cases to affirm, reverse, amend or modify a judgment, order or decree appealed from, and to enter such judgment, order or decree in the case as the Supreme Court may think proper and just, without returning the record for amendment or modification to the court below,

and may order a verdict or judgment to be set aside, and a new trial had."

The power expressly conferred by this act had been exercised by the Supreme Court for many years prior to the passage of the act.

Drew *v.* Commonwealth, 1 Wharton, 281.
Daniels *v.* Commonwealth, 7 Barr, 371.
Clellans *v.* Commonwealth, 8 Pa. St., 223.
Beale *v.* Commonwealth, 25 Pa. St., 11.

The Supreme Court found that the trial court had erred in holding that to be a sufficient legal demand which was in fact no demand at all, and further found that there was no evidence whatever that any legal demand had ever been made upon plaintiff in error. It said that if the trial court had given proper instructions to the jury as to a legal demand, plaintiff in error would have been acquitted on the counts on which he was convicted, as well as on the other counts of the indictment. The trial court should have directed a verdict for the defendant, but it having failed to do so, the Supreme Court, by virtue of the powers vested in it, proceeded to do what the trial court should have done, and instead of remanding the case, reversed the judgment and directed the discharge of plaintiff in error. The Commonwealth had utterly failed to prove plaintiff in error guilty of the charge against him, and because the trial court should have directed his acquittal but did not, the Supreme Court discharged him instead of sending the case back for a new trial.

This action of the Supreme Court as effectually disposed of the charge against plaintiff in error as if he had been acquitted by the verdict of the jury on all of the counts of the indictment.

One charged with a criminal offense is acquitted in one of two ways—by the jury or by the court. An acquittal is a setting free—a judicial discharge and a deliverance from a charge. It makes no difference whether the discharge is by

the act of the court or by the act of the jury. In the language of the American and English Encyclopedia of Law (2d ed., vol. 1, p. 572):

> "Acquittal may, in ordinary language, be used to express either a verdict of a jury or the formal judgment of the court that the prisoner go thereof without day."

If the Supreme Court had simply reversed the judgment of the trial court, and had remanded the case for a new trial, there would be grave doubts whether plaintiff in error could be tried again under the circumstances of this case. But it did not remand the case. It found that no evidence whatever had been adduced by the Commonwealth to prove the defendant guilty, and it discharged him. The lower court had failed in its duty to discharge the defendant, and the Supreme Court corrected the error and discharged him. After that action by the Supreme Court, the constitutional provision above quoted interposed its shield and afforded plaintiff in error protection against further prosecution for the same offense.

This court held in the case of Ball *v.* U. S., 163 U. S., 662, that a defendant placed on trial on a defective indictment and acquitted could not be tried again. In this case plaintiff in error was tried and acquitted on an indictment valid in every respect, both as to substance and form.

The offense of which plaintiff in error was thus acquitted by the Supreme Court was for failing to pay over, after demand, all the license moneys received by him during his term of office. The present indictment charges him with failing to pay over, after demand, part of the same identical money. Both indictments are under the same section of the Penal Code of Pennsylvania, against the same defendant, for failing to pay over, on demand, the same moneys, received during the same period. A clearer case of identity of offenses could hardly be imagined.

After the acquittal in the former case, a new demand for the money was made on plaintiff in error, and this indictment is based on that demand. It was contended by the Commonwealth in the Pennsylvania courts that the crime charged in this indictment was not committed until that demand was made, and that, as this was subsequent to the termination of the first case, necessarily the crimes charged in the two indictments could not be the same. This contention is wholly inadmissible.

If it were held that a new crime under this statute is committed each time a new demand is made, a defendant might be tried seventy times seven times for embezzling the same moneys. No number of verdicts of acquittal would protect him, nor would he have immunity from subsequent prosecutions even if he had been convicted and sentenced and served a term of imprisonment in the penitentiary. The crime would never be barred by the statute of limitations. Methuselah might be convicted in his old age for money embezzled by him in his youth.

The crime constituted by this statute is embezzlement, and can be committed but once. It is complete when a public officer has failed to turn over, after demand made upon him, public money which he has received, and no number of new demands can render him guilty of any other crime of embezzling that particular money. The statute of limitations begins to run when the first demand is made, and after demand if the officer is indicted, and is either acquitted or convicted, he cannot be tried again for the embezzlement of that same money. That the crime is complete when demand is made was decided by the Supreme Court in this very case, with reference to the statute of limitations (Rec., 30).

From certain language in the opinion of the Supreme Court of Pennsylvania in this case (Rec., 29), we infer that the contention of the Commonwealth, that the crime charged in this indictment is not the same as that charged in the

rst, proceeds upon the erroneous assumption that no legal emand could have been made upon plaintiff in error at the me the first indictment was found, and that consequently ie crime charged in that indictment could not have been ommitted. The Supreme Court of Pennsylvania labored nder the same misapprehension as to the facts when it aid in its opinion (Rec., 29) that at the time the former rosecution was instituted the statutory offense of failing to ay over on demand had not been committed, because at iat time no legal demand could have been made upon laintiff in error. This is a palpable error. The fact is that ie offense charged in the first indictment could have been ommitted at any time during a period of more than six ionths prior to the finding of the indictment. The civil suit as decided May 4, 1903; the indictment was not found ntil November 11, 1903. During all of the intervening eriod legal demand might have been made upon plaintiff n error, and if it was made he had committed the crime harged against him in the present indictment and had een acquitted of it.

It certainly was possible for the crime to have been com- iitted before the first prosecution was instituted. The in- ictment in the first case alleged that a demand had been iade, and in the face of this allegation it surely will not be resumed from the fact that no evidence of a legal demand as adduced at the trial that none had in fact been made. n favor of liberty, the presumption will be just the other ay; and, since the indictment alleges the complete crime f embezzlement in failing to pay over the license moneys fter demand, the law will presume that the crime had in ict been committed before that indictment was found. To ermit the Commonwealth's attorney to now contend other- ise, when he failed to adduce proof of a demand at the first ial, is very much like permitting a party to take advantage f his own wrong.

We submit that the crime of embezzlement with reference to this license money was committed, if committed at all, prior to the finding of the indictment in the first case, and that as plaintiff in error was acquitted in that case of the charge of embezzling that money, he cannot be tried in this case on the charge of embezzling the same identical money, but is protected by the constitutional provision against double jeopardy.

It would be against the spirit of the constitutional provision to permit this prosecution, even if the Supreme Court in the former case had not acquitted and discharged plaintiff in error, but had merely reversed the judgment of the lower court. Plaintiff in error was in jeopardy in the first case when the jury was empanelled and sworn. If the jury had then been arbitrarily discharged, without his consent and without any necessity, the constitutional provision against double jeopardy would have interposed its shield and protected him against the present prosecution. He should not be put in worse position because the jury, instead of being erroneously and arbitrarily discharged, without giving any verdict, was held together, and, in accordance with erroneous instructions of the court, rendered a wrong verdict of guilty when there was no evidence whatever to sustain it.

The English practice in felony, when a misdirection by the judge at the trial has resulted in a wrongful verdict against the defendant, has from the earliest times been, and still is, to recommend his pardon by the Crown, which is granted as of course.

1 Bishop, Crim. Law, § 1001, and cases cited.

As stated by Mr. Bishop (1 Bishop, Crim. Law, § 1003), since our constitutional guaranty is a step beyond the English maxim toward the protection of the accused, one would not have supposed that any of our courts would have de-

ted from the English practice by a step in the opposite
ection; but some of them have done so, and have held
t a defendant convicted of murder, without evidence, be-
se of the misdirection of the judge, must either be hung
trary to law or consent to the hazard of a second trial.
all other cases, rights can only be waived voluntarily
l not under duress; but in this, according to the doctrine
some of the courts, a defendant waives one of the most
nable rights guaranteed to him by the Constitution by
empting to extricate himself from a perilous situation
which he has been placed through no fault of his own,
through the fault only of the court which tried him.
he elects not to be hung contrary to law, he is held to
ve the protection against double jeopardy solemnly guar-
eed to him by the fundamental law.

f a defendant by writ of error secures a reversal of a
viction made in a court without jurisdiction, or on a de-
tive and insufficient indictment, there is reason for hold-
that he may be tried again; for if he has been in jeopardy
ll it is because of his own fault in not making seasonable
ection to the jurisdiction or to the indictment. He might
ve successfully demurred or pleaded to the one, or de-
rred to or moved to quash the other. If, instead of doing
he pleads to the merits and goes to trial and is convicted,
has helped to bring about the dilemma in which he finds
nself, and if he would have relief it is not unreasonable to
pose as a condition that he submit to another trial. Such
s the case of Ball *v.* United States, 163 U. S., 662. But
ere the court has jurisdiction and the indictment is valid,
defendant is compelled to go to trial; and if, not only
hout his concurrence, but against his objection and pro-
t, damaging evidence is erroneously admitted, or the jury
misdirected by the court, whereby he is convicted, it is
reasonable to require him either to submit to the illegal
nishment or to consent to the hazard of another trial in
der to obtain relief from it. If the execution of a deed is

induced by threats of imprisonment, the person executing it may have it set aside, as not voluntarily made; but if a person is wrongfully sentenced to be hanged, and will be unlawfully hanged unless he appeals to a higher court and secures a reversal of the judgment, his act of appeal is regarded as so far voluntary as to amount to a waiver of one of his most valuable constitutional rights!

The courts are almost unanimous on the proposition that where a defendant has been placed on trial in a court of competent jurisdiction on a valid indictment, if after the jury has been empanelled and sworn it is arbitrarily discharged by the court without any necessity, the defendant cannot be tried again on the same charge, because he has already been in jeopardy. But if the doctrine laid down by some of the courts is correct, if instead of erroneously discharging the jury, the judge holds it together and erroneously instructs them, whereby they erroneously convict the defendant, he must submit to it or undergo the hazard of another trial. In other words, if through the fault of the judge no verdict at all is rendered, the defendant cannot be tried again; but if through the judge's fault a *wrong* verdict is rendered, he can be tried again if, instead of submitting to illegal punishment, he procures the judgment to be reversed in a higher court!

The rule announced by some of the courts, that where a wrong verdict is found against a defendant because of misdirection by the court, he cannot have it corrected without relinquishing his immunity from a second jeopardy, is severely criticised by Mr. Bishop in his work on Criminal Law (vol. 1, § 1042 *et seq.*). We submit that the doctrine is wrong. As said by Mr. Bishop—

> "it overlooks the fact that our constitutional guaranty is a restraint upon the courts, and that it forbids them to make a blunder which shall compel one to ask a second trial When the Constitution declares that the State shall not put him in jeopardy twice, it is a mockery to say that it may bring him into as

> many jeopardies as it will, provided it misstates the law to the jury each time. The interpretation which makes a breach of the common or statutory law a good answer to a charge of violating the Constitution has no parallel in anything else known in our jurisprudence."

The Court of Appeals of New York, in the case of Shepherd *v.* People, 25 N. Y., 406, held that a prisoner against whom a wrong judgment was pronounced upon a regular trial and conviction can not be subjected to another trial. In that State a statute provided that "if the Supreme Court shall reverse the judgment rendered, it shall either direct a new trial or that the defendant be absolutely discharged." The sentence by the lower court appearing to have been wrong, the appellate court directed, not a new trial, but a discharge of the prisoner, on the ground that the first trial was a protection against further proceedings for the same offense.

So in this case, the trial court having failed in its duty to direct a verdict for the defendant, the Supreme Court of Pennsylvania, instead of remanding the case for a new trial, directed that the defendant be absolutely discharged.

II.

By Being Twice Placed in Jeopardy for the Same Offense, Plaintiff in Error is Deprived of His Liberty without Due Process of Law.

The contention of the plaintiff in error is that the sentence under which he now rests puts him twice in jeopardy for the same offense, and that such double jeopardy abridges his privileges and immunities as a citizen of the United States and deprives him of his liberty without due process of law.

The courts do not attempt to define "due process of law," or say what shall or what shall not be included within the

term in every case; but they agree in holding that due process of law requires the observance of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

In speaking of what is meant by the phrase "due process of law," the Supreme Court of Mississippi, in Brown *v.* Levee Commissioners, 50 Miss., 468, used this language:

> "It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these acts are disregarded in the procedure by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by due process of law."

In re Kemmler, 136 U. S., 436, this court said that the words due process of law in the Fourteenth Amendment—

> "refer to that law of the land in each State which derives its authority from the inherent and reserved power of the State exerted within the limits of those fundamental principles of liberty and justice which lie at the base of our civil and political institutions."

And again, in Allen *v.* Georgia, 166 U. S., 138, in speaking of the same subject, the court said:

> "The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

In Howard *v.* Kentucky, 200 U. S., 164, the court said:

> "It may be admitted that the words 'due process of law,' as used in the fourteenth amendment, protect fundamental rights."

Administrative and remedial processes may change from time to time with the advancement of legal science and the progress of society. Particular forms of procedure are not

guaranteed, but the cardinal, fundamental principles of justice are immutable.

The right not to be twice tried for the same offense is fundamental and sacred. It is part of the universal law of reason and justice. It is embedded in the very elements of the common law, and forms one of the strongest bulwarks of liberty. It is one of the strongest guaranties against oppression. Our courts would recognize and act upon it as one of the most valuable principles of the common law in the absence of any constitutional provision whatever on the subject.

> "This privilege, like many other valuable guaranties in criminal cases, is not the creature of the constitutions, but has its roots deeply embedded in the universal principles of reason and justice, and derives its substance from the ancient and uninterrupted rules and practices of the common law. * * * It is but the application to the criminal jurisprudence of a more general maxim, namely, that no one shall be twice vexed for one and the same cause. The object of incorporating it in the fundamental law was to render it, as respects criminal cases, inviolable by any department of the Government."
>
> Black, Const. Law, p. 586.

> "The privilege thus secured is but a constitutional recognition of an old and well-established maxim of the common law * * *. The maxim is embedded in the very elements of the common law."
>
> Mr. Justice Story, in U. S. *v.* ——, 2 Sumner, 19.

> "That the maxim of the common law which secures an individual against being placed in jeopardy a second time for the same offense is the foundation of these pleas [*autrefois acquit* and *autrefois convict*] is readily admitted. * * * The maxim was so strongly recommended by the principles of justice that no intelligent people could resist it. It was favorable to life and liberty, and was adopted as a protection to the subject."
>
> U. S. *v.* Keen, 1 McLean, 429.

"Whether expressed or not in the organic law of the State, it is the recognized law of the land that the citizen shall not be twice vexed with the same proceedings, or twice put in jeopardy of life or limb. The only effect of such affirmative provisions in constitutions is to make them irrevocable by legislative enactments."

Ex Parte Snyder, 29 Mo. App., 261.

This question was carefully considered by this court in the case of *Ex parte* Lange, 18 Wall., 163, where the court said:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule, * * * there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.

"The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.

"In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin '*Nemo bis punitur pro eodem delicto*' (2 Hawk P. C., 377), or, as Coke has it, '*Nemo debet bis puniri pro uno delicto*' (4 Co., 43*a;* 11 Co., 95*b*). 'No one can be twice punished for the same crime or misdemeanor,' is the translation of the maxim by Sergeant Hawkins.

"Blackstone, in his Commentaries, cites the same maxim as the reason why if a person has been found guilty of manslaughter on an indictment, and has had benefit of clergy, and suffered the judgment of

the law, he cannot afterwards be appealed (4 Black., 315 Shars). Of course if there had been no punishment the appeal would lie and the party would be subject to the danger of another form of trial. But by reason of this universal principle that no person shall be twice punished for the same offense, that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from the chances or danger of a second punishment on a second trial. The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

"Hence, to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defense. * * *

"These salutary principles of the common law have, to some extent, been embodied in the constitutions of the several States of the United States. By article VII of the amendments to the latter instrument, it is declared that no fact once tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law; and by article V, that no person shall for the same offense be twice put in jeopardy of life or limb, * * * nor be deprived of life, liberty, or property without due process of law.

"It is not necessary in this case to insist that other cases besides those involving life or limb are positively covered by the language of this amendment; or that when a party has had a fair trial before a competent court and jury, and has been convicted, that any excess of punishment deprives him of liberty or property without due course of law. On the other hand, it would seem equally difficult to maintain, after what we have said of the inflexible rules of the com-

mon law against a person being twice punished for the same offense, that such second punishment as is pronounced in this case is not a violation of that provision of the Constitution.

"It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection. .

"In the case of Com. *v.* Olds, 5 Litt., 137, one of the best common-law judges that ever sat on the bench of the Court of Appeals of Kentucky, remarked, 'that every person acquainted with the history of governments must know that State trials have been employed as a formidable engine in the hands of a dominant administration. * * * To prevent this mischief, ancient common law, as well as Magna Charta itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict.* To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our Constitution the clause in question.'

"In the case of Cooper *v.* State, the Supreme Court of New Jersey, after referring to the common-law maxim, says: 'The Constitution of New Jersey declares this important principle in this form: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provisions. But the framers of our Constitution have thought it worthy of a special notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. * * * Upon this principle are founded the pleas of *autrefois acquit* and *autrofois convict.*'"

* * * * * * *

> "In Moore *v.* People, 14 Howard, 13, the defendant was fined $400 under the criminal code of that State for harboring and secreting a negro slave. The case came to this court under the 25th section of the Judiciary Act, on the ground that the right to legislate on that subject was exclusive in Congress. The court did not concur in that view of the question. But it was also urged that the party might be subjected twice to punishment for the same offense if liable to be prosecuted under statute of both State and national legislatures. In regard to this Judge McLean said, in a dissenting opinion, that 'the exercise of such power by the States would, in effect, be a violation of the Constitution of the United States and of the respective States. They all provide against a second punishment for the same act. It is contrary,' said he, 'to the nature and genius of our government to permit an individual to be twice punished for the same act.'"

The first essential to due process of law is that the court which attempts to deprive a person of his liberty shall have jurisdiction so to do. Process is not due, but void, when exerted beyond the jurisdiction of the court.

In Jamison *v.* Wimbish, 130 Fed., 351, the court said:

> "In order to constitute due process of law, it is imperative that the court be of competent jurisdiction."

Guthrie, in his work on the Fourteenth Amendment, pages 104 and 105, says:

> "When the court, transgressing its functions, attempts to render judgment without jurisdiction of the subject-matter or notice to the parties, the procedure is not due process of law, and may be declared void and set aside by the courts under the jurisdiction conferred by the Fourteenth Amendment."

The Constitution of Pennsylvania provides as follows:

> "No person shall for the same offense be twice put in jeopardy of life or limb."

This provision is a limitation on the jurisdiction of the State courts. The courts of Pennsylvania have no jurisdiction to try a person who has already been placed in jeopardy for the same offense. They have no more jurisdiction to pass judgment in such a case than they would have to pass judgment upon a person who has never been subjected to their processes, or for a crime not committed to their jurisdiction. Any sentence they may pass in such a case is absolutely void, and the person sentenced is deprived of his liberty without that due process of law which is guaranteed to him by the Constitution of the United States. This principle is settled by the decisions of this court.

In *Ex parte* Lange, already referred to, Lange was convicted of an offense for which the punishment provided was either fine or imprisonment, but not both. The court inadvertently sentenced him to both fine *and* imprisonment. After he had paid the fine and served a part of the term, the court, during the same term within which the sentence was passed, discovered its error, vacated the first sentence, and resentenced him to imprisonment only. Lange sued out a writ of *habeas corpus* from this court, on the ground that the second judgment of the court punished him twice for the same offense, and was therefore void. The contention was upheld by the court, and a writ of *habeas corpus* was granted and the prisoner discharged. In the course of the opinion the court said:

> "We are of the opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone; that the principle that we have discussed then interposed its shield and forbade that he should be punished again for that offense. The record of the court's proceeding, at the moment the second sentence was rendered, showed that in that very case and for that very offense the prisoner had fully performed, completed and endured one of the alternative punishments

which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist.

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would for the same reason be void. Or if, on an indictment for treason, the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court, be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court and forbidden by the Constitution.

* * * * * * *

"Unless our reasoning has been entirely at fault, the court in the present case could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution and by the dearest principles of personal rights which both of them are supposed to maintain.

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired

> those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States or the well settled principles of the common law, we have come to the conclusion that the sentence of the circuit court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged."

In *Ex parte* Neilsen, 131 U. S., 176, the same point was decided. Neilsen was indicted in the District Court for Utah, and interposed the plea of *autrefois convict.* The Government demurred to the plea, the demurrer was sustained, and Neilsen, being convicted on his plea of not guilty, was sentenced to imprisonment in the penitentiary. He sued out a writ of *habeas corpus* on the ground that the sentence of the court was void, and was discharged. The court in the course of its opinion said:

> "In the present case, it is true, the ground for the *habeas corpus* was not the invalidity of an act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional right than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte* Lange, where the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow: The court had authority over the case, but we

held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right, and where such a case appears on the record, the party is entitled to be discharged from the imprisonment. A party is entitled to have a *habeas corpus*, not merely where the court is without jurisdiction in the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in *Ex parte* Parks, 98 U. S., 18, 22: 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the courts are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words (2 Hale's P. C., 144). And why should not such a rule prevail *in favorem libertatis?* If we have seemed to hold the contrary in any case, it has been from inadvertence. The law could hardly be stated with more categorical accuracy than it is in the opening sentence of *Ex parte* Wilson, 114 U. S., 417, 420, where Mr. Justice Gray, speaking for the court said: 'It is well settled by a series of decisions, that this court, having no jurisdiction of criminal cases by a writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence.' This proposition, it is true, relates to the power of this court to discharge on *habeas corpus* persons sentenced by the circuit and district courts; but with regard to the power of discharging on *habeas corpus*, it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

In *Ex parte* Ulrich, 42 Fed. Rep., 587, Ulrich was indicted for bigamy in the State courts of Missouri. After his trial had begun and evidence had been introduced by the State, the judge adjourned the case to take up the trial of another case set for that day and on the adjournment day, on the ground that he was not feeling well, discharged the jury without the prisoner's consent. Afterwards Ulrich was put on trial on the same indictment before another jury. He filed a motion in the nature of a plea in bar, asking that he be discharged on the ground that he had already been placed in jeopardy, and, in legal effect, acquitted by the former proceedings in the case. The motion was overruled, and the prisoner was found guilty and sentenced to a term in the penitentiary. After a motion for a new trial and in arrest of judgment had been overruled, he filed a petition for a writ of *habeas corpus* in the district court of the United States for the western district of Missouri, on the ground that his imprisonment was in violation of the Federal Constitution. The court ordered his discharge on the ground that he was deprived of his liberty without due process of law. The court said:

> "Since it is a principle of the common law that no one shall be twice placed in jeopardy for the same offense, the trial and commitment of one who has already been tried and acquitted of the same offense is depriving him of his liberty without due process of law, within the meaning of the fourteenth amendment."

In re Bennett, 84 Fed. Rep., 324, the court used this language:

> "The right of a person, after acquittal by jury, to be exempt from the jeopardy of being again placed on trial in the same court and upon the same indictment for the identical offense for which he had been acquitted is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to the citizen; and unquestionably the guarantee of due process of law

> found in the fourteenth amendment of the Constitution of the United States was intended, among other things, to secure to the citizen this right, and deprived the State of authority to convict and punish a person for a crime of which he has been duly acquitted by a jury when the fact of such former acquittal is made to appear to the court before which he is again put in jeopardy for the same offense."

In criminal trials certain matters pertaining to procedure have been declared by this court to involve fundamental rights of which the person accused of crime may not be deprived without the denial of due process of law. It may be said generally that whatever matters are jurisdictional or essential are protected by the Constitution.

In Hopt *v.* Utah, 110 U. S., 574, the court said:

> "The legislature has deemed it essential to the protection of one whose life or liberty is involved in a procedure for felony that he shall be personally present at the trial—that is, at every stage of the trial when his rights may be affected by the proceedings against him. To be deprived of life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."
>
> To the same effect see Lewis *v.* U. S., 146 U. S., 372.

In Crain *v.* U. S., 162 U. S., 624, this court held that due process of law requires that the accused plead, or be ordered to plead, or in a proper case that a plea of not guilty be filed for him before his trial can rightly proceed.

In the case of Murphy *v.* Mass., 177 U. S., 155, the court took jurisdiction on the sole question whether placing a person twice in jeopardy deprived him of his liberty without due process of law, but the case was decided on another ground.

We submit that the judgment of the Supreme Court of Pennsylvania, affirming the judgment of the Court of

Quarter Sessions, should be reversed. Plaintiff in error is under sentence for an alleged offense for which he was once before tried and acquitted. The fact of his former acquittal was duly raised by his plea of *autrefois acquit,* and stands confessed on the record of the court by the Commonwealth's demurrer. When that fact appeared to the court, its power to pass judgment in the case was gone. By proceeding to judgment and sentence, it transcended its jurisdiction and deprived plaintiff in error of his liberty without due process of law.

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Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 508.

JOHN T. SHOENER, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

The plaintiff in error, John T. Shoener, by and through his attorneys, Charles A. Douglas and William Wilhelm, opposes the motion to dismiss, and supplements the statement of facts set forth by the defendant in error in the following important particulars:

Statement of Facts.

John T. Shoener was elected clerk of the Court of Quarter Sessions of Schuylkill County, Pennsylvania, at the November election, in 1899, for a term of three years, and on the first Monday in January, 1900, took upon himself the duties of the office.

Prior to his election, on the 30th of July, 1897, an act of the assembly was passed (Pamphlet Laws, pp. 469, 470) which provided that every person intending to apply for a liquor license should pay to the clerk $5 for expenses connected therewith, and that the clerk should cause to be published twice in three newspapers designated by him a list containing the names of all such applicants, their respective residences, and the place for which application was made. Under the peculiar wording of the act, it was contended that this was an expense fund wholly under the control of the clerk of the court for the purposes designated in the act.

The question as to whether or not the money received by the clerk on liquor-license applications was a fee to be turned into the county treasury, or a fund specially under the control of the clerk of the court, was passed upon in a case stated first in the Common Pleas Court of Schuylkill County, and subsequently carried to the Supreme Court of Pennsylvania. The appellate court, on May 4, 1903, some months after the plaintiff in error had gone out of office, decided that the license money was a fee to be paid into the county treasury.

The whole amount that was received on these liquor-license applications during the term of office of plaintiff in error was $18,245. It was finally determined that all the fees of the office, including the money received on the liquor-license applications, was $7,243.28 in excess of the salaries of the plaintiff in error and his clerks. The plaintiff in error had given ample bond to protect the county, and since this case has gotten into this court his bond has paid the balance that it was found be owed the county of Schuylkill.

Section 65 of the Penal Code of Pennsylvania of 1860, is as follows:

> "If any State, county, township or municipal officer of this Commonwealth, charged with the collection, safe-keeping, transfer or disbursement of public money, shall convert to his own use, in any way

whatsoever, or shall use by way of investment in any kind of property or merchandise, any portion of the public money intrusted to him for collection, safe-keeping, transfer or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the State, county, or township treasurer, or other proper officer or person authorized to demand and receive the same, every such act shall be deemed and adjudged to be an embezzlement of so much of said money as shall be thus taken, converted, invested, used or unaccounted for, which is hereby declared a misdemeanor; and every such officer, and every person or persons whomsoever aiding or abetting, or being in any way accessory to said act, and being thereof convicted, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine equal to the amount of money embezzled."

On November 14, 1903, plaintiff in error was indicted under this section on thirteen counts. The first four counts covered the money that he had received the first year he was in office; the fifth, sixth, seventh, and eighth, the second year; the ninth, tenth, eleventh, and twelfth, the third year, and the thirteenth count was for certain moneys that he had received during all of the three years. This will be found on pages 84 to 91, inclusive, of the Record.

The first, fifth, and ninth counts charged plaintiff in error with converting the license money above mentioned to his own use, and with using it by way of investment in property and merchandise; the second, sixth, and tenth counts charged him with using it by way of investment in property and merchandise; the third, seventh, and eleventh counts charged him with converting it to his own use, and the fourth, eighth, and twelfth counts charged him with failing to pay it over on demand. The thirteenth was an omnibus count, charging plaintiff in error with converting certain of the money to his own use, with using it by way of investment in property and merchandise, with failing to

pay it over on demand, and with being a defaulter as to it. Plaintiff in error was acquitted on the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh, and thirteenth counts of the indictment and convicted on the fourth, eighth, and twelfth—the counts charging him with having failed to pay over the money on demand. These counts charged the offense in these words:

> "That John T. Shoener, * * * clerk of the Court of Quarter Sessions of Schuylkill county, * * * did by virtue of his said office * * * receive, collect, and take into his possession certain public moneys * * * and * * * did fail to pay over the same, when thereunto legally required by the county of Schuylkill or its legally authorized officers to the treasurer of the county of Schuylkill, he being the proper officer authorized to demand and receive the same" * * * (Rec., pp. 84-91).

On appeal by the plaintiff in error to the Supreme Court of Pennsylvania, that court, on June 22, 1905, reversed the lower court and directed that the plaintiff in error be discharged from his recognizance. In the course of its opinion the Supreme Court of Pennsylvania said:

> "The eleventh assignment complains of the error of the court below in instructing the jury that there had been legal demand made upon the defendant to pay over the fees. This assignment should have been sustained. *If there had been proper instructions as to a legal demand, the defendant would have been acquitted on the counts on which he was convicted.* The remaining assignments need not be considered. The judgment of the superior court is reversed, as is that of the court below and the defendant is discharged from his recognizance" (Rec., p. 161).

After his acquittal on June 22, 1905, when plaintiff in error was freed and discharged from his recognizance, a new criminal proceeding was started—he was put under new

bail, and on September 4, 1905, was again indicted and charged with the same offense set out in the fourth, eighth, and twelfth counts of the former indictment, and was convicted September 8, 1905, and sentenced to pay a fine of $7,243.28 and to be imprisoned in jail for two years and six months.

The second indictment charged plaintiff in error with failing to pay over on demand moneys constituting parcel of the same identical money which he was charged in the first indictment with having failed to pay over on demand, the sum of $7,243.28 being the balance of fees collected in excess of the salaries of the plaintiff in error and his clerks. The offense is charged in the second indictment as follows:

> "That John T. Shoener, * * * clerk of the Court of Quarter Sessions of Schuylkill County, * * * did by virtue of his said office * * * receive, collect and take into his possession certain moneys for fees as aforesaid, to a large amount, to wit, $7,243.28, * * * which said sum F. J. Noonan, the said treasurer, did on the 30th day of June, A. D. 1905, demand and require him, the said John T. Shoener, to pay over to him, the said treasurer, and the said John T. Shoener did unlawfully fail to pay over the same unto the said treasurer when thereunto legally required as aforesaid by the said F. J. Noonan, treasurer of the county of Schuylkill, he the said F. J. Noonan being the proper officer to demand and receive the same" (Rec., pp. 80, 81).

There is no difference between the language of the fourth, eighth, and twelfth counts of the first indictment and the language of the second indictment, except in this, that the first indictment did not name the county treasurer authorized to demand and receive the money and the second indictment did.

When the case came to trial the defendant pleaded *autrefois acquit,* and in his plea recited the indictment of the first

trial in full, as is shown by the Record, from pages 100 to 109, inclusive. To this plea the defendant in error demurred (Rec., p. 110). The Quarter Sessions Court sustained the demurrer (Rec., pp. 111-114). On the trial, the plaintiff in error, under his general plea of not guilty, put in evidence the record as to his former acquittal. The court on that question directed a verdict against the plaintiff in error (Rec., p. 164) using this language:

> "Under these circumstances, and in view of what has already occurred in this case, I deem it my duty to say to you that you should find in favor of the Commonwealth on the issue of former acquittal. In other words, I direct that it be your verdict as being a proper and required discharge of duty upon my part, and the clerk having taken that verdict I will then address you on the question of guilt or innocence or whatever other questions are raised."

The jury then rendered the following verdict:

> "On issue of former acquittal we find in favor of the Commonwealth."

A verdict of guilty was found by the jury on the general-issue plea, and plaintiff in error was sentenced to pay a fine of $7,243.28, and to be imprisoned in jail two years and six months.

The judgment of the Court of Quarter Sessions was affirmed by the Supreme Court of Pennsylvania June 27, 1906 (Rec., p. 30).

A motion was made for a rehearing, and on October 22, 1906, a rehearing was refused.

On November 3, 1906, this writ of error was sued out (Rec., pp. 1, 2).

ARGUMENT.

The errors assigned by plaintiff in error are found in the Record at pages 179 to 181, inclusive. The substance of his contention is that he has already been acquitted of the offense with which he is charged in the indictment in the present case, and that by being again tried for the same offense he is deprived of his liberty without due process of law, in violation of the provisions of the Constitution of the United States.

I.

Plaintiff in Error Has Been Twice Placed in Jeopardy for the Same Offense.

There is no contention on behalf of the plaintiff in error that it is the province of this court to review what we allege was the error of the Court of Quarter Sessions of Schuylkill County, affirmed by the Supreme Court of Pennsylvania, in not protecting the defendant under his plea of the statute of limitations. It was conceded that two years was the statutory period within which he could be indicted for the alleged embezzlement. The plaintiff in error went out of office January 4, 1903. He was not indicted until September 4, 1905—a period of two years and eight months after he had gone out of office. The Supreme Court of Pennsylvania has decided that the statute of limitations would start to run from the time that the demand was made, as required by the act of the assembly, and as the demand, the basis of this suit, was not made until nearly two years and six months after the moneys were received, and the plaintiff in error had gone out of office, the plaintiff in error must respectfully bow to the adverse decision of the Supreme Court of Pennsylvania upon his plea of the statute of limitations. The question raised here is one of far more vital im-

portance. It relates to the protection that under the State and Federal Constitutions should have been given the defendant on the question of twice in jeopardy.

The plaintiff in error was tried on January 6, 1904, on an indictment that contained thirteen counts, for embezzling certain license fees that had been received by him. He was elected clerk of the Quarter Sessions Court of Schuylkill County, Pennsylvania. All papers pertaining to liquor licenses in Schuylkill county are kept in the Quarter Sessions Court. The act of assembly of Pennsylvania of 1897 (Pamphlet Laws, pp. 469, 470) authorized him to receive these moneys to pay the expenses, which included the advertising of each license application for two weeks in three papers. The question of whether or not the act of the assembly gave him these license moneys for expenses or were fees of the office was carried to the Supreme Court of Pennsylvania, and that court on May 4, 1903, decided that they were fees of the office. All officers of Schuylkill county must turn over their fees to the county treasurer, and they and their clerks receive from the county treasurer stated salaries. The total amount of the license fees the plaintiff in error contended were under his control under the act of 1897 was $18,425. As a matter of fact, after he and his clerks were paid the salaries they were entitled to, the balance due the county was $7,243.28.

On November 14, 1903, an indictment was found containing thirteen counts, charging the plaintiff in error with the embezzlement of these license fees. There were four counts covering each one of the three years of his term of office, and the thirteenth count was a general count, covering certain of the moneys for all the years. The jury acquitted him on ten of the thirteen counts and convicted him on three of the counts—four, eight, and twelve. The fourth, eighth, and twelfth counts charged the offense of failing to pay over on demand. He was indicted under the 65th section of the act of 1860 of the Penal Code of Pennsyl-

vania. The Supreme Court of Pennsylvania used this language in acquitting him on the fourth, eighth, and twelfth counts:

> "He has been acquitted on the counts charging him with conversion of the public funds to his own use, and there was no evidence to sustain the conviction on the charge that he had failed to pay over after having been thereunto legally required on demand made. The eleventh assignment complains of the error of the court below in instructing the jury that there had been legal demand made upon the defendant to pay over the fees. The assignment should have been sustained. IF THERE HAD BEEN PROPER INSTRUCTIONS AS TO A LEGAL DEMAND THE DEFENDANT WOULD HAVE BEEN ACQUITTED ON THE COUNTS ON WHICH HE WAS CONVICTED. The remaining assignments need not be considered. The judgment of the Superior Court is reversed, as is that of the court below, and the defendant is discharged from his recognizance."

The language of the fourth, eighth, and twelfth counts of the indictment, upon which he was convicted in the Quarter Sessions Court and acquitted in the Supreme Court, is:

> "Did fail to pay over the same when thereunto required by the county of Schuylkill or its legally authorized officers to the treasurer of the county of Schuylkill, he being the proper officer authorized to demand and receive the same."

This judgment of acquittal on the fourth, eighth, and twelfth counts was rendered on June 22, 1905. On June 30, 1905, the county treasurer made a demand for the $7,243.28. Later on a representative of the Taxpayers' Association brought a new prosecution for the same moneys for which he had been indicted and acquitted. At the trial the question of the right to try the plaintiff in error was raised by demurrer to a plea of *autrefois acquit*, claiming that in

violation of the provisions of the State and Federal Constitutions defendant was being put twice in jeopardy for the same offense. This plea of *autrefois acquit* recited the first indictment in full, and will be found on pages 83 to 93, inclusive, and also on pages from 100 to 109, inclusive, of the printed record before this court, the indictment in this case being found on pages 80 and 81. The only difference in the language as to the two indictments is that the fourth, eighth, and twelfth counts of the first indictment did not designate the county treasurer by name and did not specify the date of the demand; but in all other respects the language of the two indictments is the same. In the first case the language was "to the treasurer of the county of Schuylkill;" in the second case, "F. J. Noonan, treasurer of the county of Schuylkill." The language of the act of assembly, as set out on page 5 of the brief of defendant in error, is as follows:

> "fail to pay over the same when thereunto legally required by the State, county or township treasurer, or other proper officer or person authorized to demand and receive the same."

It is respectfully submitted that the plaintiff in error has been twice in jeopardy, and that the protection afforded every citizen of the United States under the constitutional provision found in article 5 of the amendments, which provides, "Nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb," and article 14, which provides, "that no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive a person of life, liberty or property without due process of law," has been denied him.

What is twice in jeopardy? What the text-writers and what the decisions have uniformly held is summarized in the language found in 12 Cyc., 261, which says:

> "Accused is placed in jeopardy when he has pleaded and has been put on trial before a court of competent jurisdiction upon an indictment valid and sufficient in form and substance to sustain a conviction."

There is no question as to the validity of the first indictment upon which he was tried. The indictment was all it could be, both in form and substance. He was tried in a proper court of competent jurisdiction. There was ample in the indictment to sustain a conviction. In fact, he was convicted and sentenced. But although the highest appellate court in Pennsylvania found no fault with the indictment, found there was no error as to the court having jurisdiction, and did not set out that the indictment was insufficient to sustain a conviction, it did say that the court below should have directed a verdict of acquittal because of a lack of proof. Both indictments are against the same defendant, for the same public moneys, covering the same period, the same proof was offered in both cases except as to the demand, the charge was made under the same section of the Criminal Code of Pennsylvania, and in the first case the Supreme Court of Pennsylvania said that the court below should have directed a verdict of acquittal on the fourth, eighth, and twelfth counts. The lower court having failed to so direct a verdict of acquittal, the Supreme Court of Pennsylvania ordered one by directing that the plaintiff in error be discharged from his recognizance. It is true that, after the Supreme Court of Pennsylvania acquitted him on the only three counts that the jury had convicted him on, a new demand was made for these same moneys, and in that respect they proved the additional fact of the new demand; but that does not change the fact that he was in jeopardy before, under a charge of failing to pay over the same moneys, on an indictment in form and substance the same and before a court of competent jurisdiction.

The defendant in error refers to the case of Ball *v.* U. S.,

163 U. S., 662, and so far as we have been able to find, they probably find more in that case to sustain their contention than can be found in any other in the books. Still, a careful reading of that case certainly will give the plaintiff in error the relief that he is asking for in this court. In that case Millard Fillmore Ball, John C. Ball, and Robert E. Boutwell were indicted for the murder of William T. Box, and Millard Fillmore Ball was found not guilty and was discharged. Subsequently the court reversed the judgment convicting John C. Ball and Robert E. Boutwell, because the indictment was fatally defective and could not support the sentence for murder, and remanded the case, directing that the indictment be quashed and for further proceedings. In other words, the indictment lacked form and substance. They were not discharged from their recognizance; so that, so far as the case may be cited by the defendant in error, it does not help their contention, because it was one and the same case. The defendants were not discharged from custody. It was but an attempt on the part of the Commonwealth to try them on an improper indictment, and so long as the indictment was lacking in form and in substance, there was no trial. They were not in jeopardy in a legal sense. But all we claim in the protection of this plaintiff in error the court in that very case afforded Millard Fillmore Ball. In that case Millard Fillmore Ball pleaded former jeopardy, and the court sustained the well-settled doctrine that where there is once an acquittal, even if that indictment be defective, the plea of former acquittal is good.

Now, was there a former acquittal in the case in hand? We need but take the language of Justice Brown of the Supreme Court of Pennsylvania, in which he says that the eleventh assignment should have been sustained, and uses this language:

> "If there had been proper instructions as to a legal demand the defendant would have been acquitted on the counts on which he was convicted;"

And then enters the following judgment:

> "The judgment of the Superior Court is reversed, as is that of the court below, and the defendant is discharged from his recognizance."

Thus he wiped out the case entirely, because the plaintiff in error had been acquitted on ten of the thirteen counts, and as to the remaining three the highest court held he should have been acquitted and did acquit him by discharging him from his recognizance.

If Justice Brown in his opinion (Rec., p. 158) meant only to reverse the court below or arrest judgment, so that defendant could be retried, then his language does not conform to what he intended. The learned Justice, though, even said that the court below erred in not sustaining the eleventh assignment of error, and stated in unequivocal words that the plaintiff in error would have been acquitted had the court not erred. Why was not the plaintiff acquitted on the fourth, eighth, and twelfth counts of the indictment? Justice Brown clearly states that it was because there had not been proper instructions to the jury by the court below. Was it understood, then, that there was a mere reversal or arrest of judgment, so that the defendant could be indicted again in the same case? Certainly it was not. It could not be, as he was discharged from his recognizance. One charged with a criminal offense is acquitted in one of two ways—by the jury or by the court. An acquittal is a setting free—a judicial discharge and a deliverance from a charge. Was not the plaintiff in error set free, discharged and delivered from the charge? It makes no difference whether it was the act of the jury or the court. "Acquit," in the language of the American and English Encyclopedia of Law (2d ed.), vol. 1, page 572, "may in ordinary language be used to express either a verdict of the jury or the formal judgment of the court that the prisoner go thereof without day." Did not the Supreme Court of Pennsylvania

say, when it discharged the plaintiff from his recognizance, that he go without day? The court even said, that had not the court below erred he would have been acquitted. If plaintiff in error were acquitted as to ten of the counts by the jury, and as to the remaining three by the court, do any of the decisions cited, either in the brief of defendant in error or referred to by the court in Murphy *v.* Mass., 177 U. S., 155, or Ball *v.* United States, 163 U. S., 662, contravene the principle that when a citizen is once tried and acquitted he cannot be tried again for the same offense? The plaintiff in error was set free, discharged and delivered from the charge. All that is attempted now is to retry him on a similar charge—embezzlement—for the same moneys, covering the same period of time, before the same tribunal, and there is no pretense that the former indictment was lacking either in form or substance, or that the court did not have jurisdiction. It is a case of the Commonwealth of Pennsylvania trying to convict where they had not the evidence to convict, and then, after an acquittal, doing something to supply the missing evidence and pursuing the party in another case on the same charge on which he was acquitted.

In conclusion, therefore, of this branch of the argument, it is respectfully submitted that plaintiff in error has been heretofore acquitted of the offense with which he is now charged, and that by being placed a second time on trial for that offense he is being deprived of his liberty without due process of law.

II.

By Being Twice Placed in Jeopardy for the Same Offense, Plaintiff in Error is Deprived of His Liberty without Due Process of Law.

The contention of the plaintiff in error is that the sentence under which he now rests puts him twice in jeopardy for

the same offense, and that such double jeopardy abridges his privileges and immunities as a citizen of the United States and deprives him of his liberty without due process of law.

The courts do not attempt to define "due process of law," or say what shall or what shall not be included within the term in every case; but they agree in holding that due process of law requires the observance of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

In speaking of what is meant by the phrase "due process of law," the Supreme Court of Mississippi, in Brown *v.* Levee Commissioners, 50 Miss., 468, used this language:

> "It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these acts are disregarded in the procedure by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by due process of law."

In *Re* Kemmler, 136 U. S., 436, this court said that the words due process of law in the fourteenth amendment—

> "refer to that law of the land in each State which derives its authority from the inherent and reserved power of the State exerted within the limits of those fundamental principles of liberty and justice which lie at the base of our civil and political institutions."

And again in Allen *v.* Georgia, 166 U. S., 138, in speaking of the same subject, the court said:

> "The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

In Howard *v.* Kentucky, 200 U. S., 164, the court said:

> "It may be admitted that the words 'due process of law,' as used in the fourteenth amendment, protect fundamental rights."

Administrative and remedial processes may change from time to time with the advancement of legal science and the progress of society. Particular forms of procedure are not guaranteed, but the cardinal, fundamental principles of justice are immutable.

The right not to be twice tried for the same offense is fundamental and sacred. It is part of the universal law of reason and justice. It is embedded in the very elements of the common law, and forms one of the strongest bulwarks of liberty. It is one of the strongest guaranties against oppression. Our courts would recognize and act upon it as one of the most valuable principles of the common law in the absence of any constitutional provision whatever on the subject.

> "This privilege, like many other valuable guaranties in criminal cases, is not the creature of the constitutions, but has its roots deeply embedded in the universal principles of reason and justice, and derives its substance from the ancient and uninterrupted rules and practices of the common law. * * * It is but the application to the criminal jurisprudence of a more general maxim, namely, that no one shall be twice vexed for one and the same cause. The object of incorporating it in the fundamental law was to render it, as respects criminal cases, inviolable by any department of the Government."
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> Black, Const. Law, p. 586.

> "The privilege thus secured is but a constitutional recognition of an old and well-established maxim of the common law * * *. The maxim is embedded in the very elements of the common law."
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> Mr. Justice Story, in U. S. *v.* ——, 2 Sumner, 19.

> "That the maxim of the common law which secures an individual against being placed in jeopardy a second time for the same offense is the foundation of these pleas [*autrefois acquit* and *autrefois convict*] is readily admitted. * * * The maxim was so

strongly recommended by the principles of justice that no intelligent people could resist it. It was favorable to life and liberty, and was adopted as a protection to the subject."

U. S. *v.* Keen, 1 McLean, 429.

"Whether expressed or not in the organic law of the State, it is the recognized law of the land that the citizen shall not be twice vexed with the same proceedings, or twice put in jeopardy of life or limb. The only effect of such affirmative provisions in constitutions is to make them irrevocable by legislative enactments."

Ex Parte Snyder, 29 Mo. App., 261.

This question was carefully considered by this court in the case of *Ex parte* Lange, 18 Wall., 163, where the court said:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule, * * * there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.

"The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.

"In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin '*Nemo bis punitur pro eodem delicto*' (2 Hawk P. C., 377), or, as Coke has it, '*Nemo debet bis puniri pro uno delicto*' (4 Co., 43*a*; 11 Co., 95*b*). 'No one can be twice punished for the same crime or

misdemeanor,' is the translation of the maxim by Sergeant Hawkins.

"Blackstone, in his Commentaries, cites the same maxim as the reason why if a person has been found guilty of manslaughter on an indictment, and has had benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed (4 Black., 315 Shars). Of course if there had been no punishment the appeal would lie and the party would be subject to the danger of another form of trial. But by reason of this universal principle that no person shall be twice punished for the same offense, that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial. The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

"Hence, to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defense. * * *

"These salutary principles of the common law have, to some extent, been embodied in the constitutions of the several States of the United States. By article VII of the amendments to the latter instrument, it is declared that no fact once tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law; and by article V, that no person shall for the same offense be twice put in jeopardy of life or limb, * * * nor be deprived of life, liberty, or property without due process of law.

"It is not necessary in this case to insist that other cases besides those involving life or limb are positively covered by the language of this amendment; or that

when a party has had a fair trial before a competent court and jury, and has been convicted, that any excess of punishment deprives him of liberty or property without due course of law. On the other hand, it would seem equally difficult to maintain, after what we have said of the inflexible rules of the common law against a person being twice punished for the same offense, that such second punishment as is pronounced in this case is not a violation of that provision of the Constitution.

"It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.

"In the case of Com. *v.* Olds, 5 Litt., 137, one of the best common-law judges that ever sat on the bench of the Court of Appeals of Kentucky, remarked, 'that every person acquainted with the history of governments must know that State trials have been employed as a formidable engine in the hands of a dominant administration. * * * To prevent this mischief, ancient common law, as well as Magna Charta itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our Constitution the clause in question.'

"In the case of Cooper *v.* State, the Supreme Court of New Jersey, after referring to the common-law maxim, says: 'The Constitution of New Jersey declares this important principle in this form: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provisions. But the framers of our Constitution have thought it worthy of a special notice. And all who are conversant with

> courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. * * * Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict.*'"
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> "In Moore *v.* People, 14 Howard, 13, the defendant was fined $400 under the criminal code of that State for harboring and secreting a negro slave. The case came to this court under the 25th section of the Judiciary Act, on the ground that the right to legislate on that subject was exclusive in Congress. The court did not concur in that view of the question. But it was also urged that the party might be subjected twice to punishment for the same offense if liable to be prosecuted under statute of both State and national legislatures. In regard to this Judge McLean said, in a dissenting opinion, that 'the exercise of such a power by the States would, in effect, be a violation of the Constitution of the United States and of the respective States. They all provide against a second punishment for the same act. It is contrary,' said he, 'to the nature and genius of our government to permit an individual to be twice punished for the same act.'"

The first essential to due process of law is that the court which attempts to deprive a person of his liberty shall have jurisdiction so to do. Process is not due, but void, when exerted beyond the jurisdiction of the court.

In Jamison *v.* Wimbish, 130 Fed., 351, the court said:

> "In order to constitute due process of law, it is imperative that the court be of competent jurisdiction."

Guthrie, in his work on the Fourteenth Amendment, pages 104 and 105, says:

> "When the court, transgressing its functions, attempts to render judgment without jurisdiction of the subject-matter or notice to the parties, the procedure is not due process of law, and may be declared

> void and set aside by the courts under the jurisdiction conferred by the Fourteenth Amendment."

The Constitution of Pennsylvania provides as follows:

> "No person shall for the same offense be twice put in jeopardy of life or limb."

This provision is a limitation on the jurisdiction of the State courts. The courts of Pennsylvania have no jurisdiction to try a person who has already been placed in jeopardy for the same offense. They have no more jurisdiction to pass judgment in such a case than they would have to pass judgment upon a person who has never been subject to their processes, or for a crime not committed to their jurisdiction. Any sentence they may pass in such a case is absolutely void, and the person sentenced is deprived of his liberty without that due process of law which is guaranteed to him by the Constitution of the United States. This principle is settled by the decisions of this court.

In *Ex parte* Lange, already referred to, Lange was convicted of an offense for which the punishment provided was either fine or imprisonment, but not both. The court inadvertently sentenced him to both fine *and* imprisonment. After he had paid the fine and served a part of the term, the court, during the same term within which the sentence was passed, discovered its error, vacated the first sentence, and resentenced him to imprisonment only. Lange sued out a writ of *habeas corpus* from this court, on the ground that the second judgment of the court punished him twice for the same offense, and was therefore void. The contention was upheld by the court, and a writ of *habeas corpus* was granted and the prisoner discharged. In the course of the opinion the court said:

> "We are of the opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of

the court to punish further was gone; that the principle that we have discussed then interposed its shield and forbade that he should be punished again for that offense. The record of the court's proceeding, at the moment the second sentence was rendered, showed that in that very case and for that very offense the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist.

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would for the same reason be void. Or if, on an indictment for treason, the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court, be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court and forbidden by the Constitution.

* * * * * * *

"Unless our reasoning has been entirely at fault,

the court in the present case could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution and by the dearest principles of personal rights which both of them are supposed to maintain.

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States or the well settled principles of the common law, we have come to the conclusion that the sentence of the circuit court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged."

In *Ex parte* Neilsen, 131 U. S., 176, the same point was decided. Neilsen was indicted in the District Court for Utah, and interposed the plea of *autrefois convict*. The Government demurred to the plea, the demurrer was sustained, and Neilsen, being convicted on his plea of not guilty, was sentenced to imprisonment in the penitentiary. He sued out a writ of *habeas corpus* on the ground that the sentence of the court was void, and was discharged. The court in the course of its opinion said:

"In the present case, it is true, the ground for the *habeas corpus* was not the invalidity of an act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional right than an

unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte* Lange, where the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow: The court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right, and where such a case appears on the record, the party is entitled to be discharged from the imprisonment. A party is entitled to have a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in *Ex parte* Parks, 98 U. S., 18, 22: 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the courts are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words (2 Hale's P. C., 144). And why should not such a rule prevail *in favorem libertatis?* If we have seemed to hold the contrary in any case, it has been from inadvertence. The law could hardly be stated with more categorical accuracy than it is in the opening sentence of *Ex parte* Wilson, 114 U. S., 417, 420, where Mr. Justice Gray, speaking for the court said: 'It is well settled by a series of decisions, that this court, having no jurisdiction of criminal cases by a writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence.'

> This proposition, it is true, relates to the power of this court to discharge on *habeas corpus* persons sentenced by the circuit and district courts; but with regard to the power of discharging on *habeas corpus*, it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

In *Ex parte* Ulrich, 42 Fed. Rep., 587, Ulrich was indicted for bigamy in the State courts of Missouri. After his trial had begun and evidence had been introduced by the State, the judge adjourned the case to take up the trial of another case set for that day, and on the adjournment day, on the ground that he was not feeling well, discharged the jury without the prisoner's consent. Afterwards Ulrich was put on trial on the same indictment before another jury. He filed a motion in the nature of a plea in bar, asking that he be discharged on the ground that he had already been placed in jeopardy, and, in legal effect, acquitted by the former proceedings in the case. The motion was overruled, and the prisoner was found guilty and sentenced to a term in the penitentiary. After a motion for a new trial and in arrest of judgment had been overruled, he filed a petition for a writ of *habeas corpus* in the district court of the United States for the western district of Missouri, on the ground that his imprisonment was in violation of the Federal Constitution. The court ordered his discharge on the ground that he was deprived of his liberty without due process of law. The court said:

> "Since it is a principle of the common law that no one shall be twice placed in jeopardy for the same offense, the trial and commitment of one who has already been tried and acquitted of the same offense

> is depriving him of his liberty without due process of law, within the meaning of the fourteenth amendment."

In re Bennet, 84 Fed. Rep., 324, the court used this language:

> "The right of a person, after acquittal by jury, to be exempt from the jeopardy of being again placed on trial in the same court and upon the same indictment for the identical offense for which he had been acquitted is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to the citizen; and unquestionably the guarantee of due process of law found in the fourteenth amendment of the Constitution of the United States was intended, among other things, to secure to the citizen this right, and deprived the State of authority to convict and punish a person for a crime of which he has been duly acquitted by a jury when the fact of such former acquittal is made to appear to the court before which he is again put in jeopardy for the same offense."

In criminal trials certain matters pertaining to procedure have been declared by this court to involve fundamental rights of which the person accused of crime may not be deprived without the denial of due process of law. It may be said generally that whatever matters are jurisdictional or essential are protected by the Constitution.

In Hopt *v.* Utah, 110 U. S., 574, the court said:

> "The legislature has deemed it essential to the protection of one whose life or liberty is involved in a procedure for felony that he shall be personally present at the trial—that is, at every stage of the trial when his rights may be affected by the proceedings against him. To be deprived of life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."
>
> To the same effect see Lewis *v.* U. S., 146 U. S., 372.

In Crain *v.* U. S., 162 U. S., 624, this court held that due process of law requires that the accused plead, or be ordered to plead, or in a proper case that a plea of not guilty be filed for him before his trial can rightly proceed.

In the case of Murphy *v.* Mass., 177 U. S., 155, the court took jurisdiction on the sole question whether placing a person twice in jeopardy deprived him of his liberty without due process of law, but the case was decided on another ground.

We submit that the motion to dismiss should be overruled, and that the case should proceed to a hearing on the merits. Plaintiff in error is under sentence for an alleged offense for which he was once before tried and acquitted. The fact of his former acquittal was duly raised by his plea of *autrefois acquit*, and stands confessed on the record of the court of the Commonwealth's demurrer. When that fact appeared to the court, its power to pass judgment in the case was gone. By proceeding to judgment and sentence, it transcended its jurisdiction and deprived plaintiff in error of his liberty without due process of law.

CHAS. A. DOUGLAS,
WILLIAM WILHELM,
E. B. SHERRILL,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1906.

JOHN T. SHOENER, plaintiff in error,
v.
THE COMMONWEALTH OF PENNSYLVANIA.
No. 508.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

MOTION TO DISMISS; OR TO ADVANCE.

Comes now the District Attorney of Schuylkill county, in the Commonwealth of Pennsylvania, on behalf of the defendant in error in the above-entitled cause, and moves the Court to dismiss the same for want of jurisdiction, or to advance the same (Rule 26, par. 3) for oral hearing or submission on a day convenient to the Court during the present term.

The plaintiff in error, John T. Shoener, was elected Clerk of the Court of Quarter Sessions of Schuylkill county, in the State of Pennsylvania, for a three-year term, commencing January 1, 1900. Under the laws of Pennsylvania, county officers in Schuylkill county are paid a fixed salary and are required to pay into the treasury of the county all fees received by them as earnings of their office, and all fees earned in excess of the office salaries belong to the county. The fees of the said office for the term exceeded its salaries by $18,245. The plaintiff

in error retained this sum and laid claim to it under the provisions of the Act of July 30, 1897, Laws of Pennsylvania. The County of Schuylkill denied his claim and on November 20, 1901, brought an action against him for the moneys received in 1900. A case stated was agreed upon December 22, 1902, and the Court entered judgment in favor of the County of Schuylkill. An appeal was taken to the Supreme Court of Pennsylvania and the judgment was affirmed May 4, 1903.

The plaintiff in error failed to pay to the County of Schuylkill the fees thus judicially declared to belong to the county, and was indicted in the Court of Quarter Sessions of said county for embezzlement, or a failure to pay over said money, November 14, 1903. He was convicted January 6, 1904, on counts 4, 8 and 12 of said indictment. March 7, 1904, he was sentenced to imprisonment for the term of three years. He appealed from this judgment to the Superior Court of Pennsylvania, which sustained the judgment. An appeal from this judgment was taken to the Supreme Court of Pennsylvania, which reversed the judgment of the Superior Court, June 22, 1905, on the ground that no demand within the meaning of the statute, had been made on the defendant for the moneys alleged to have been embezzled, and dischargd him from his recognizance.

The treasurer of Schuylkill county made demand June 30, 1905, upon the plaintiff in error, for the payment to the county of the sum of $7,243.28, being the balance of the fees retained by him. He failed to comply with this demand and was indicted for embezzlement, September 4, 1905; convicted September 8, 1905; sentenced October 23, 1905, to an imprisonment of two and a-half years. Appealed from this judgment to the Superior Court of

Pennsylvania, which affirmed the judgment, March 12, 1906. Appealed from this judgment to the Supreme Court of Pennsylvania, which affirmed the judgment, June 27, 1906.

A petition for a rehearing and for the allowance of a writ of error having been denied by the Supreme Court of Pennsylvania, this writ of error was sued out.

I. A. REED,
District Attorney.

C. E. BERGER,
GUY E. FARQUHAR,
Counsel for defendant in error for the purposes of this motion.

To CHARLES H. DOUGLAS,
WASHINGTON, D. C.

Please take notice, that on the 29th day of April, 1907, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed hereto is a copy of our brief or argument in support of said motion.

I. A. REED,
District Attorney.

C. E. BERGER,
GUY E. FARQUHAR,
Counsel for defendant in error for the purposes of this motion.

No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1906.

JOHN T. SHOENER, Plaintiff in Error,

v.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR THE STATE IN SUPPORT OF THE MOTION TO DISMISS; OR TO ADVANCE.

ARGUMENT

I.

The first conviction of the plaintiff in error, out of which arises the claim of double jeopardy.

The plaintiff in error was convicted for the first time of the crime of embezzlement under the provisions of Section 65 of the Act of March 31, 1860, pamphlet laws of Pennsylvania, p. 385, which provides:

> If any state, county, township or municipal officer of this Commonwealth, charged with the collection, safe-keeping, transfer or disbursement of

> public money, shall convert to his own use, in any way whatsoever, or shall use by way of investment in any kind of property or merchandise, and portion of the public money intrusted to him for collection, safe-keeping, transfer or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the state, county or township treasurer, or other proper officer or person authorized to demand and receive the same, every such act shall be deemed and adjudged to be an embezzlement of so much of said money as shall be thus taken, converted, invested, used or unaccounted for, which is hereby declared a misdemeanor; and every such officer, and every person or persons whomsoever aiding or abetting, or being in any way accessory to said act, and being thereof convicted, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine equal to the amount of money embezzled.

In Commonwealth vs. Mentzer, 162 Pa. 646, this section of the penal code was thus construed by the Supreme Court of Pennsylvania:

> The sixty-fifth section of the Act of March 31, 1860, clearly specifies four distinct and separate acts with reference to public money, which shall constitute the offence of embezzlement, to wit, conversion to the officer's own use, investment in property or merchandise, becoming a defaulter, or *failing to pay over on proper demand.* These

> are enumerated in the disjunctive and it is further declared that "every such act" shall be deemed and adjudged an embezzlement. Each of these acts, therefore, though of varying degree of moral turpitude, is of equal legal import and by itself constitutes the full statutory offence. Prima facie therefore *each of such acts charged is a separate crime,* and where such is the fact no two can be charged in the same count.

The first indictment was found November 14, 1903, and contained thirteen counts drawn under Section 65 of the Act of 1860. (Rec. pp. 84-92.) The defendant was acquitted on counts 1, 2, 3, 5, 6, 7, 9, 10, 11 and 13 in this bill, and convicted on counts 4, 8 and 12. The counts on which he was convicted charged the defendant with embezzlement, in language as follows:

> That John T. Shoener * * * * * * * Clerk of the Court of Quarter Sessions of Schuylkill County * * * * did by virtue of his said office * * * * * * * receive, collect and take into his possession certain public moneys * * * and * * * * * did fail to pay over the same, when thereunto legally required by the County of Schuylkill or its legally authorized officers to the treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same. * * * (Rec., pp. 86, 89, 91.)

Upon the trial of this bill of indictment the Commonwealth relied for proof of demand within the meaning of the statute, upon a letter from the County Controller to

the defendant on December 30, 1902, (Rec., p. 158), and upon the additional fact that the defendant's claim of ownership to the moneys alleged to have been embezzled had been decided against him by the Supreme Court of Pennsylvania, May 4, 1903. (Rec., pp. 159, 160), which judgment, it was urged, constituted another demand upon the defendant to pay over the moneys collected. The Court below, also taking this view of the case, denied the defendant's motion for a verdict of not guilty on the ground of the insufficiency of the commonwealth's proof of demand, and the jury convicted the defendant. This conviction, on an appeal by the defendant to the Superior Court, was sustained. On appeal from this judgment to the Supreme Court the judgment was reversed on the ground—conceding the Controller's demand good in point of law if made at the the proper time —that no right of demand existed prior to May 4, 1903. and that the decision of that date rendered by the Supreme Court of Pennsylvania could not be treated as a constructive demand. Com. vs. Shoener. (Rec., pp. 158-162). Thereupon the defendant was discharged from his recognizance.

II.

The second conviction of the plaintiff in error.

The treasurer of Schuylkill county made demand June 30, 1905, upon the plaintiff in error for the payment of $7,243.28 due by him to the county. (Rec., p. 143.) No payment was made to the county after this demand. (Rec., p. 146.) The defendant was arrested and again indicted for embezzlement under Section 65 of the Act of March, 31, 1860, *supra,* upon a bill containing one count charg-

ing *only a failure to pay over* on the demand of the treasurer. (Rec., pp. 80, 81.)

To the second indictment the defendant demurred, assigning several causes, the third of which, that the crime charged was barred by the statute of limitations, needs only to be considered. This point of demurrer was:

> Third. That the offence charged in said indictment is barred by the statute of limitations, the same having been found more than two years after the money alleged to have been received by the defendant and which he failed to pay over, came into his hands. (Rec., p. 82.)

The demurrer was overruled (Rec., p. 97) and the defendant assigned this as error. (Rec., p. 42.) The Commonwealth conceded that Section 77 of the Act of March 31, 1860, (P. L. of Pa., p. 427) fixed the period of limitation at two years from the commission of the offence. (Rec., pp. 96, 97.) This section reads:

> All indictments which shall hereafter be brought or exhibited for any crime or misdemeanor, murder and voluntary manslaughter excepted, shall be brought or exhibited within the time and limitation hereafter expressed and not after; that is to say, all indictments in prosecutions for treason, arson, sodomy, buggery, robbery, burglary, perjury, counterfeiting, forgery, uttering or publishing any bank note, check or draft, knowing the same to be counterfeited or forged, shall be brought or exhibited within five years next after the offence shall have been committed; and all indictments and prosecutions for other felonies not

named or excepted heretofore in this section and *for all misdemeanors,* perjury excepted, shall be brought or exhibited *within two years next after such felony or misdemeanor shall have been committed.*

The Commonwealth contended, because of the construction placed upon Section 65 of the Act of March 31, 1860, in Com. vs. Mentzer, and in Com. vs. Shoener, *supra,* that the failure to pay over within a reasonable time after the demand of June 30, 1905, constituted the offence. The defense now claimed that the offence dated either from the receipt of the money, or from the failure to pay over after the decision of the Supreme Court of Pennsylvania, adverse to the defendant's claim of ownership. Mr. Justice Brown, of the Pennsylvania Supreme Court, in disposing of this question, in Com. vs. Shoener, (Rec., p. 29), says:

> Equally unavailing is the plea of the statute of limitations. It was admittedly the duty of the appellant to pay over the money in his hands, when he learned, on May 4, 1903, that they belonged to the county; but his failure to perform that duty was not a crime, and, as long as he retained the moneys without a demand from the county that he pay them over, he was not committing the statutory offence for which he was prosecuted in the present proceedings. *Failure to pay over was not an offence; failure to pay over on demand was.* The county, for any reason, might have indulged him, and, having done so, its indulgence, which kept him from committing crime,

> cannot, under the plea of the statute of limitations, be now turned into a shield by him to protect him from the consequences of his crime after his commission of it. When he was still legally liable to pay to the county the fees which he had collected, demand was made upon him to pay them over. *When he failed to comply with that demand, he, for the first time, committed the offence charged against him in the present indictment, and from the time of his refusal to pay over, June 30, 1905, and from that time only, could the statute of limitations begin to run.*

By this decision the Supreme Court of Pennsylvania construed Section 65 of the Act of March 31, 1860, defining the crime of embezzlement by public officers, in respect to the time that the crime—failing to pay over on proper demand—is complete within the meaning of the act.

It was not, at any time, claimed by the defendant that the said act was in conflict with the Constitution of the United States, or with any of the laws of the United States. The construction placed on this act by the Supreme Court of Pennsylvania is the only ground of complaint. The judgment of that court is founded on *its own construction* of the statute. No Federal question was raised by the record.

In Phoenix Insurance Co. vs. The Treasurer, 11 Wall., 204, the Court, speaking by Mr. Justice Bradley, says:

> In order to give this court jurisdiction by writ of error under the 25th Section of the Judiciary Act, it must appear by the record (or certificate of

the State court) that a Federal question was raised.

And he continues:

> Now, we have repeatedly held that the construction of State statutes belongs to the State courts, and is not a Federal question which we can revise in a writ of error to a State court.

In Smiley vs. Kansas, 196 U. S., 447, Mr. Justice Brewer thus states the rule:

> It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. We accept the construction given to a State statute by that court, St. Louis I. M.&S. R. Co. vs. Paul, 173, U. S. 404, 408, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Missouri K. & T. R. Co. vs. McCann, 174 U. S. 580, 586, 43 L. ed. 1093, 1096, 19 Sup. Ct. Rep. 755; Tullis vs. Lake Erie & W. R. Co., 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

The decison of the Supreme Court of Pennsylvania sustaining the court below in overruling the third point of demurrer, *supra*, was founded on its own construction of Section 65 of the Act of March 31, 1860, *supra*, and was based on grounds not involving a Federal question, and broad enough to sustain the judgment. The court, by this decsion, fixed the time of the commission of the offence under the statute subsequent to June 30, 1905, thus bringing the defendant within the two year period of limitation, and excluding any possible claim of former jeopardy.

In Eustis vs. Bolles, 150 U. S., 360, this Court says

> It is settled law that, to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a Federal question was presented for decision by the State court, but that its decision was necessary for the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Murdock vs. Memphis, 87 U. S., 20 Wall. 590 (22:429); Cook County vs. Calumet & Chicago C. & D. Co. 138 U. S. 635 (34:1110).

The Court continues:

> It is likewise settled law that, when the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment.

Mr. Justice McKenna, in Harrison vs. Morton, 171 U. S. 38, approves this rule.

III.

The effect of setting aside of a verdict or reversal of a judgment, and the defendant's claim that he has been denied some right, privilege or immunity under the constitution of the united states.

The assignment of errors in this case (Rec., pp. 179-181) raises the questions of double jeopardy and the denial of due process of law. The record discloses nothing to sustain either contention. We shall first consider the claim of former jeopardy.

The Constitution of the United States provides that "No person shall be subject for the same offence to be twice placed in jeopardy of life or limb." The Constitution of the State of Pennsylvania provides that "No person shall for the same offence be twice put in jeopardy of life or limb." These provisions are identical but for the omission of the words "be subject" in the Constitution of Pennsylvania.

Chief Justice Mercur, of the Supreme Court of Pennsylvania, in Hilands vs. the Commonwealth, 111 Pa. 1, in construing the jeopardy clause contained in the Constitution of the State of Pennsylvania, said:

> It will be observed that the constitutional provision does not declare that a person shall not be *twice tried* for the same offence which involves his life or limb, but that he shall not be twice put in jeopardy.

In Com. vs. Fitzpatrick, 121 Pa. 117, Mr. Justice Williams said:

> There may be room to doubt the wisdom of the constitutional provision in its present form, but there is no room for discussion as to its effect. The justice of sustaining a plea of former acquittal or conviction is unquestioned and unquestionable, but a plea of "once in jeopardy" stands on narrower, more technical, and less substantial ground. It alleges only that there might have been a conviction or an acquittal if the judge trying the case had not made a mistake in law, which prevented a verdict. *It is of no consequence how many mistakes he makes if the trial results in a conviction. The mistake can be corrected on a writ of error and the defendant tried over again.*

The rule is the same in the Supreme Court of the United States. In Ball vs. United States, 163 U. S. 662, wherein John C. Ball and Robert E. Boutwell had filed a plea of former jeopardy by reason of their trial and conviction upon a former indictment charging murder, which judgment had been reversed on appeal by them, this court, in sustaining their second conviction, said:

> Their plea of former conviction cannot be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held

> to bar a new indictment against them need not be considered, because it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment for the same offence of which he had been convicted. Hopt vs. Utah, 104 U. S. 631 (26:873), 110 U. S. 574 (28:262), 114 U. S. 488 (29:183) 120 U. S. 430 (30:708); Reg. vs. Drury, 3 Cox C. C. 544, 3 Carr & K. 193; Com. vs. Gould, 12 Gray, 171. The Court therefore rightly overruled their plea of former jeopardy, and cannot have prejudiced them by afterwards permitting them to put in evidence the former conviction, and instructing the jury that the plea was bad.

In Trono vs. United States, 199 U. S. 521, the question was whether Trono, who had been convicted of assault, which is included in murder, on an indictment charging murder, and who had obtained a reversal of the judgment on a writ of error, could be re-tried on the original charge of murder, or of assault only. This Court, speaking by Mr. Justice Peckham, for the majority, said:

> We may regard the question as thus presented as the same as if it arose in one of the Federal Courts in this country, where, upon an indictment for a greater offence, the jury had found the accused not guilty of that offence, but guilty of a lower one which was included in it, and, upon an appeal from that judgment by the accused, a new

trial has been granted by the Appellate Court, and the question was whether, upon the new trial accorded, the accused could be tried again for the greater offence set forth in the indictment, or must the trial be confined to that offence of which the accused had previously been convicted, and which conviction had, upon his own motion, been set aside and reversed by the higher Court.

And again this Court says:

In our opinion the better doctrine is, that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offence of which the accused was convicted on the first trial, but that the reversal of the judgment and the conviction opens up the whole controversy, and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it, and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offence contained in

the judgment which he has himself procured to be reversed.

The defendant was not twice put in jeopardy for the same offence, but was twice tried, each time for a different offence. Mr. Justice Brown in sustaining the conviction said:

> In support of his plea of *autrefois acquit* the appellant relies upon our reversal of the former judgment against him. The jury on the trial of the first indictment found him guilty of having failed to pay over the license fees in his hands after demand had been made upon him to do so. Our reversal of the judgment on that verdict *did not acquit him* of the offence charged against him in the present indictment. All that we decided was that, as the County of Schuylkill could not at the time the prosecution was instituted, have made legal demand upon the appellant for the payment of the fees in his hands, the statutory offence of failing to pay over had not been committed. He was discharged from his recognizance *simply because the prosecution against him had been instituted before the offense charged against him was or could have been committed* under the admitted facts in the case. *He was, therefore, never in jeopardy.* (Rec., p. 29).

The question of double jeopardy was raised by the defendant by filing a special plea of *autrefois acquit,* upon which the commonwealth joined issue by demurrer to the plea. (Rec., 100-110). After the demurrer had been sustained the defendant pleaded the general issue, the

statute of limitations, and was also permitted by the Court to plead specially *autrefois acquit*. The commonwealth joined issue on these pleas, and the defendant having put in evidence the former conviction, the jury was directed by the Court to find against him on that plea. (Rec., pp. 162-165). This instruction was in accordance with the law of Pennsylvania as declared in Solliday vs. The Commonwealth, 28 Pa., 13, from which we quote:

> A former conviction of the same offence may therefore always be pleaded; and, if the truth of such plea be established, it is a plain bar to another judgment against the accused. If the representative of the commonwealth traverses the plea by denying that the former conviction was for the same offence, and thus forms an issue of fact, it must go to the jury, and no judgment can be given in the case until the question is disposed of. No matter how clear the opinion of the Court may be against the defendant, nobody but the jury can decide an issue like that. The judge may *influence* the verdict—in some cases he may and ought to *control* it—but he cannot pronounce it.

In Ball vs. United States, supra., the same rule is declared by this Court.

We have attempted to show that the conviction of the defendant in this case has been obtained in due course of law under the statute of the State of Pennsylvania defining embezzlement and upon grounds independent of any federal question. We respectfully submit that the defendant has been denied no right, privilege or immunity guaranteed to him by the provisions of the Four-

teenth Amendment to the Constitution of the United States. This Court said, in Howard v. Kentucky, 200 U. S. 173:

> We cannot assume error in the decision of the Court of Appeals. We accept it, as we are bound to do, as a correct exposition of the law of the State, statutory, constitutional. Our inquiry can only be, Did the State law *as applied,* afford plaintiff in error *due process,* as those words are used in the Fourteenth Amendment? We think it did. It is not necessary to enter into a lengthy discussion of what constitutes due process of law. * * * It may be contended that the words 'due process of law,' as used in the Fourteenth Amendment, protect fundamental rights. What those are cannot ever be the cause of such dispute. In giving them protection, however, it was not designed * * * to interfere with the power of the State to protect the rights, liberty and property of its citizens, nor *with the exercise of that power* in the adjudication of the Courts of the State in *administering the process provided by the law of the State.*

It is submitted that the motion to dismiss for want of jurisdiction should be granted, or, failing that, that the

motion to advance should be granted in the interest of public justice.

I. A. REED,
District Attorney.

C. E. BERGER,
GUY E. FARQUHAR,
Counsel for defendant in error.

(The Supreme Court, U. S.
FILED
OCT 17 1907
JAMES H. MCKENNEY,
Clerk.)

No. 161.

In the Supreme Court of the United States

OCTOBER TERM, 1906.

JOHN T. SHOENER, Plaintiff in Error

v.

THE COMMONWEALTH OF PENNSYLVANIA

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF ARGUMENT FOR THE COMMONWEALTH

In the Supreme Court of the United States

OCTOBER TERM, 1906.

JOHN T. SHOENER, plaintiff in error,
v.
THE COMMONWEALTH OF PENNSYLVANIA. } No. 508.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

STATEMENT

The plaintiff in error, John T. Shoener, was elected Clerk of the Court of Quarter Sessions of Schuylkill County, in the State of Pennsylvania, for a three-year term, commencing January 1, 1900. Under the laws of Pennsylvania, county officers in Schuylkill County are paid a fixed salary and are required to pay into the treasury of the county all fees received by them as earnings of their respective offices, and all fees earned in excess of the office salaries belong to the county. The plaintiff in error collected under the provisions of the Act of July 30, 1897, P. L., 469, the sum of $18,245 in license fees, and retained said sum under a claim that it was not an earning of his office for which he was obliged to account to the County of Schuylkill. The county denied his claim and on November 20, 1901, brought an action against him

for the moneys received in 1900. A case stated was agreed on December 22, 1902, and the Court entered judgment in favor of the county of Schuylkill. An appeal was taken from this judgment to the Supreme Court of Pennsylvania, and the judgment was affirmed May 4, 1903. Schuylkill County v. Shoener, 205 Pa. 592.

The plaintiff in error failed to pay to the County of Schuylkill the fees thus judicially declared to belong to the county, and was indicted in the Court of Quarter Sessions of said county for embezzlement, and for a failure to pay over said money on demand, November 14, 1903, under the provisions of Section 65 of the Act of March 31, 1860, P. L. 385. He was convicted January 6, 1904, on counts 4, 8 and 12 of said indictment, charging a failure to pay over on demand. March 7, 1904, he was sentenced to imprisonment for the term of three years. He appealed from this judgment to the Superior Court of Pennsylvania, which sustained the judgment. An appeal from this judgment was taken to the Supreme Court of Pennsylvania, which reversed the judgment of the Superior Court, June 22, 1905, on the ground that no demand, within the meaning of the statute, had been made on the defendant for the moneys alleged to have been embezzled or retained, and discharged him from his recognizance. Com. v. Shoener, 212 Pa. 527. (Rec. 158-162.)

The treasurer of Schuylkill county then made demand, June 30, 1905, upon the plaintiff in error, for the payment to the county of the sum of $7,243.28, being the balance of the fees retained, and found to belong to the county on an audit of his accounts. He failed to comply with this demand and was indicted September 4, 1905, for failing

to pay over said sum upon demand; he was convicted September 8, 1905; sentenced October 23, 1905, to an imprisonment of two and a-half years. He appealed from this judgment to the Superior Court of Pennsylvania, which affirmed the judgment, March 12, 1906. On an appeal to the Supreme Court of Pennsylvania, this judgment was affirmed, June 27, 1906. Com. v. Shoener, 216 Pa. 71. (Rec. 29.) A petition for a writ of error to the Supreme Court of the United States having been denied by Chief Justice Mitchell of the Pennsylvania Supreme Court, this writ of error was sued out. (Rec. 37-39.)

ARGUMENT

I

The First Conviction of the Plaintiff in Error, Out of Which Arises the Claim of Double Jeopardy.

The plaintiff in error was convicted of the crime of embezzlement under the provisions of Section 65 of the Act of March 31, 1860, pamphlet laws of Pennsylvania p. 385, which provides:

> If any state, county, township or municipal officer of this Commonwealth, charged with the collection, safe-keeping, transfer or disbursement of public money, shall convert to his own use, in any way whatsoever, or shall use by way of investment in any kind of property or merchandise, any portion of the public money intrusted to him for collection, safe-keeping, transfer or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the state, county or township treasurer, or other proper officer or person authorized to demand and receive the same, every such act shall be deemed and ad-

> judged to be an embezzlement of so much of said money as shall be thus taken, converted, invested used or unaccounted for, which is hereby declared a misdemeanor; and every such officer, and every person or persons whomsoever aiding or abetting, or being in any way accessory to said act and being thereof convicted, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine equal to the amount of money embezzled.

In Commonwealth v. Mentzer, 162 Pa. 646, this section of the penal code was thus construed by the Supreme Court of Pennsylvania:

> The sixty-fifth section of the Act of March 31, 1860, clearly specifies four distinct and separate acts with reference to public money, which shall constitute the offence of embezzlement, to wit, conversion to the officer's own use, investment in property or merchandise, becoming a defaulter, or *failing to pay over on proper demand*. These are enumerated in the disjunctive and it is further declared that "every such act" shall be deemed and adjudged an embezzlement. Each of these acts, therefore, though of varying degree of moral turpitude, is of equal legal import and by itself constitutes the full statutory offence. Prima facie therefore *each of such acts charged is a separate crime*, and where such is the fact no two can be charged in the same count.
>
> But while as a matter of public policy each act has been individualized and made to amount to the full and completed offence, the statute could not, nor has it attempted to, change the nature of the acts as possible parts of the same transaction, and where that is in fact the case, and two or more of the enumerated acts are in truth only successive

steps in one appropriation or embezzlement of the same money, it would be contrary to the fundamental principles of our criminal jurisprudence to hold that they had not merged and become but one offence. The possible consequences of any other view are too serious to permit of its entertainment. Thus a public officer might invest the money in property and lose it, and thereby become a defaulter, and fail to pay over to the treasurer. Each of these acts by itself would under the statute be an embezzlement, and make him liable to an imprisonment of five years, yet if they were successive steps in but one taking of the same public money they would amount to but one crime in fact, and it is not to be supposed that the statute intended that he should be indicted, convicted and sentenced to fifteen years on the separate branches of it, or that a conviction and sentence for the final act of failure to pay should not be a good defence to a separate indictment for the previous act of investment in property. We must give the statute a reasonable construction, in accordance not only with its plain general intent, but also with the fundamental principles of our criminal law.

The four specified acts may therefore be four distinct and separate offences, or they may be so entirely parts of the same transaction that they combine to make but one. *Into which category they fall must depend on the facts of each case, and therefore must raise a question of fact for the jury.*"

The first indictment was found November 14, 1903, and contained thirteen counts drawn under Section 65 of the Act of 1860. (Rec. pp. 84-92.) The defendant was acquitted on counts 1, 2, 3, 5, 6, 7, 9, 10, 11 and 13

in this bill. Counts 1, 5, 9 and 13 charged that the defendant, John T. Shoener,

> "Clerk of the Court of Quarter Sessions of Schuylkill County * * * did by virtue of his said office, * * * fraudulently, willfully and corruptly embezzle and convert to his own use the said public moneys, * * * and did use by way of investment in property and merchandise * * said public moneys, * * * and did prove a defaulter * * * of the aforesaid public moneys, * * * and did fail to pay over the same * * * to the Treasurer of Schuylkill County." (Rec. 85, 87, 89, 91.)

In these counts, then, "The four specified acts" are charged "as parts of the same transaction" and combined as one. (Com. v. Mentzer, supra.) This raised a question of fact for the jury, and the jury by its verdict found that the defendant did not commit these four acts conjointly.

Counts 2, 6 and 10 charged that the defendant, John T. Shoener:

> "Clerk of the Court of Quarter Sessions of Schuylkill County * * * did by virtue of his said office, * * * use by way of investment in property and merchandise, * * * the said public moneys." (Rec. 85, 87, 90.)

On these counts the jury determined by its verdict that the defendant did not commit the separate and distinct offence of the investment of public moneys in property or merchandise.

Counts 3, 7 and 11 charged that defendant, John T. Shoener:

> "Clerk of the Court of Quarter Sessions of Schuylkill County * * * did by virtue of his said office, * * * convert to his own use the said public moneys." (Rec. 85, 88, 91.)

On these counts the jury found that the defendant did not commit the offence of converting the public moneys to his own use.

Counts 4, 8 and 12, on which he was convicted, charged the defendant with a failure to pay over on demand, in language as follows:

> That John T. Shoener * * * * * * * Clerk of the Court of Quarter Sessions of Schuylkill County * * * * did by virtue of his said office * * * * * * * receive, collect and take into his possession certain public moneys * * * and * * * * * did fail to pay over the same, when thereunto legally required by the County of Schuylkill or its legally authorized officers to the treasurer of the County of Schuylkill, he being the proper officer authorized to demand and receive the same. * * * (Rec., pp. 86, 89, 91.)

The jury, then, were unable to find from the evidence that the four acts enumerated in Section 65 of the Act of 1860, supra, combined and formed one complete offence; or that the separate offences of investment in property or merchandise, or the conversion of the public moneys to his own use, were committed; but they did find that he was guilty of a failure to pay over on demand. This verdict is entirely consistent from the view point that the Commonwealth had failed to prove the combination of the four acts as one whole, or that the defendant either invested or converted the money to his own use; but that

the commonwealth did establish—whether the defendant was then in possession of the money or not—that he had failed to pay it over on demand.

Upon the trial of this bill of indictment the Commonwealth relied for proof of demand within the meaning of the statute, upon a letter from the County Controller to the defendant on December 30, 1902, (Rec., p. 158), and upon the additional fact that the defendant's claim of ownership to the moneys alleged to have been embezzled had been decided against him by the Supreme Court of Pennsylvania, May 4, 1903, (Rec., pp. 159, 160), which judgment, it was urged, constituted another demand upon the defendant to pay over the moneys collected. The Court below, also taking this view of the case, denied the defendant's motion for a verdict of not guilty on the ground of the insufficiency of the Commonwealth's proof of demand, and the jury convicted the defendant. This conviction, on an appeal by the defendant to the Superior Court, was sustained. On appeal from this judgment to the Supreme Court the judgment was reversed on the ground—conceding the Controller's demand good in point of law if made at the proper time—that no right of demand existed prior to May 4, 1903, and that the decision of that date rendered by the Supreme Court of Pennsylvania could not be treated as a constructive demand. Com. vs. Shoener. (Rec., pp. 158-162). Thereupon the defendant was discharged from his recognizance.

II

The Second Conviction of the Plaintiff in Error.

The Treasurer of Schuylkill county made demand June 30, 1905, upon the plaintiff in error for the payment of

$7,243.28 due by him to the county. (Rec., p. 143.) No payment was made to the county after this demand. (Rec., p. 146.) The defendant was arrested and again indicted for embezzlement under Section 65 of the Act of March, 31, 1860, supra, upon a bill containing one count charging *only a failure to pay over* on the demand of the treasurer. (Rec., pp. 80, 81.)

To the second indictment the defendant demurred, assigning several causes, the third of which, that the crime charged was barred by the statute of limitations, needs only to be considered. This point of demurrer was:

> Third. That the offence charged in said indictment is barred by the statute of limitations, the same having been found more than two years after the money alleged to have been received by the defendant and which he failed to pay over, came into his hands. (Rec., p. 82.)

The demurrer was overruled (Rec., p. 97) and the defendant assigned this as error. (Rec., p. 42.) The Commonwealth conceded that Section 77 of the Act of March 31, 1860, (P. L. of Pa., p. 427) fixed the period of limitation at two years from the commission of the offence. (Rec., pp. 96, 97.) This section reads:

> All indictments which shall hereafter be brought or exhibited for any crime or misdemeanor, murder and voluntary manslaughter excepted, shall be brought or exhibited within the time and limitation hereafter expressed and not after; that is to say, all indictments in prosecutions for treason, arson, sodomy, buggery, robbery, burglary, perjury, counterfeiting, forgery, uttering or publishing any bank note, check or draft, knowing the same to be counterfeited or forged, shall be

> brought or exhibited within five years next after the offence shall have been committed; and all indictments and prosecutions for other felonies not named or excepted heretofore in this section and *for all misdemeanors,* perjury excepted, shall be brought or exhibited *within two years next after such felony or misdemeanor shall have been committed.*

The Commonwealth contended, because of the construction placed upon Section 65 of the Act of March 31, 1860, in Com. v. Mentzer, and in Com. v. Shoener supra, that the failure to pay over within a reasonable time after the demand of June 30, 1905, constituted the offence. The defense now claimed that the offence dated either from the receipt of the money, or from the failure to pay over after the decision of the Supreme Court of Pennsylvania, adverse to the defendant's claim of ownership. Mr. Justice Brown, of the Pennsylvania Supreme Court, in disposing of this question, in Com. v. Shoener, (Rec., p. 29), says:

> Equally unavailing is the plea of the statute of limitations. It was admittedly the duty of the appellant to pay over the money in his hands, when he learned, on May 4, 1903, that they belonged to the county; but his failure to perform that duty was not a crime, and, as long as he retained the moneys without a demand from the county that he pay them over, he was not committing the statutory offence for which he was prosecuted in the present proceedings. *Failure to pay over was not an offence; failure to pay over on demand was.* The county, for any reason, might have indulged him, and, having done so, its indulgence, which kept him from committing crime,

> cannot, under the plea of the statute of limitations, be now turned into a shield by him to protect him from the consequences of his crime after his commission of it. When he was still legally liable to pay to the county the fees which he had collected, demand was made upon him to pay them over. *When he failed to comply with that demand, he, for the first time, committed the offence charged against him in the present indictment, and from the time of his refusal to pay over, June* 30, 1905, *and from that time only, could the statute of limitations begin to run.*

By this decision the Supreme Court of Pennsylvania construed Section 65 of the Act of March 31, 1860, defining the crime of embezzlement by public officers, in respect to the time that the crime—failing to pay over on proper demand—is complete within the meaning of the Act.

It was not, at any time, claimed by the defendant that the said act was in conflict with the Constitution of the United States, or with any of the laws of the United States. The construction placed on this act by the Supreme Court of Pennsylvania is the only ground of complaint. The judgment of that court is founded on *its own construction* of the statute. No Federal question was raised by the record.

In Phoenix Insurance Co. v. The Treasurer, 11 Wall., 204, the Court, speaking by Mr. Justice Bradley says:

> In order to give this court jurisdiction by writ of error under the 25th Section of the Judiciary Act, it must appear by the record (or certificate of the State court) that a Federal question was raised.

And he continues:

> Now, we have repeatedly held that the construction of State statutes belongs to the State courts, and is not a Federal question which we can revise in a writ of error to a State court.

In Smiley v. Kansas, 196 U. S., 447, Mr. Justice Brewer thus states the rule:

> It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. We accept the construction given to a State statute by that court, St. Louis I. M. & S. R. Co. v. Paul, 173, U. S. 404, 408, 43L. ed. 746, 19 Sup. Ct. Rep. 419; Missouri K. & T. R. Co. v. McCann, 174 U. S. 580, 586, 43 L. ed. 1093, 1096, 19 Sup. Ct. Rep. 755; Tullis v. Lake Erie & W. R. Co., 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

The decision of the Supreme Court of Pennsylvania sustaining the court below in overruling the third point of demurrer, supra, was founded on its own construction of Section 65 of the Act of March 31, 1860, supra, and was based on grounds not involving a Federal question, and broad enough to sustain the judgment. The court, by this decision, fixed the time of the commission of the offence under the statute subsequent to June 30, 1905.

The decision of the Supreme Court of Pennsylvania fixing the time when the crime was committed, or the statute of limitations began to run, was the decision of a **question exclusively within its jurisdiction. It was decisive of the plea of former jeopardy because the first conviction was had on an indictment found November 14, 1903, and the crime charged in the second indictment had no legal existence prior to June 30, 1905.**

In Eustis v. Bolles, 150 U. S., 360, this Court says:

> It is settled law that, to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a Federal question was presented for decision by the State court, but that its decision was necessary for the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Murdock v. Memphis, 87 U. S., 20 Wall, 590 (22:429); Cook County v. Calumet & Chicago C. & D. Co. 138 U. S. 635 (34:1110).

The Court continues:

> It is likewise settled law that, when the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment.

Mr. Justice McKenna, in Harrison v. Morton, 171 U. S. 38, approves this rule.

III

The Effect of Setting Aside of a Verdict or Reversal of a Judgment, and the Defendant's Claim That he has Been Denied Some Right, Privilege or Immunity under the Constitution of the United States.

The assignment of errors in this case (Rec., pp. 179-181) raises the questions of double jeopardy and the de-

nial of due process of law. The record discloses nothing to sustain either contention. We shall first consider the claim of former jeopardy.

The Constitution of the United Sates provides that "No person shall be subject for the same offence to be twice placed in jeopardy of life or limb." The Constitution of the State of Pennsylvania provides that "No person shall for the same offence be twice put in jeopardy of life or limb." These provisions are identical but for the omission of the words "be subject" in the Constitution of Pennsyivania.

Chief Justice Mercur, of the Supreme Court of Pennsylvania, in Hilands v. the Commonwealth, 111 Pa., 1, in construing the jeopardy clause contained in the Constitution of the State of Pennsylvania, said:

> It will be observed that the constitutional provision does not declare that a person shall not be *twice tried* for the same offence which involves his life or limb, but that he shall not be twice put in jeopardy.

In Com. v. Fitzpatrick, 121 Pa. 117, Mr. Justice Williams said:

> There may be room to doubt the wisdom of the constitutional provision in its present form, but there is no room for discussion as to its effect. The justice of sustaining a plea of former acquittal or conviction is unquestioned and unquestionable, but a plea of "once in jeopardy" stands on narrower, more technical, and less substantial ground. It alleges only that there might have been a conviction or an acquittal if the judge trying the case had not made a mistake in law, which prevented a verdict. *It is of no consequence how*

> *many mistakes he makes if the trial results in a conviction. The mistake can be corrected on a writ of error and the defendant tried over again.*

The rule is the same in the Supreme Court of the United States. In Ball v. United States, 163 U. S. 662, wherein John C. Ball and Robert E. Boutwell had filed a plea of former jeopardy by reason of their trial and conviction upon a former indictment charging murder, which judgment had been reversed on appeal by them, this court, in sustaining their second conviction, said:

> Their plea of former conviction cannot be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them need not be considered, because it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment for the same offence of which he had been convicted. Hopt. v. Utah, 104 U. S. 631 (26:873), 110 U. S. 574 (28:262), 114 U. S. 488 (29:183) 120 U. S. 430 (30:708); Reg. v. Drury, 3 Cox C. C. 544, 3 Carr & K. 193; Com. v. Gould, 12 Gray, 171. The Court therefore rightly overruled their plea of former jeopardy, and cannot have prejudiced them by afterwards permitting them to put in evidence the former conviction, and instructing the jury that the plea was bad.

In Trono v. United States, 199 U. S. 521, the question was whether Trono, who had been convicted of assault,

which is included in murder, on an indictment charging murder, and who had obtained a reversal of the judgment on a writ of error, could be retried on the original charge of murder, or of assault only. This Court, speaking by Mr. Justice Peckham, for the majority, said:

> We may regard the question as thus presented as the same as if it arose in one of the Federal Courts in this country, where, upon an indictment for a greater offence, the jury had found the accused not guilty of that offence, but guilty of a lower one which was included in it, and, upon an appeal from that judgment by the accused, a new trial has been granted by the Appellate Court, and the question was whether, upon the new trial accorded, the accused could be tried again for the greater offence set forth in the indictment, or must the trial be confined to that offence of which the accused had previously been convicted, and which conviction had, upon his own motion, been set aside and reversed by the higher court.

And again this Court says:

> In our opinion the better doctrine is, that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offence of which the accused was convicted on the first trial, but that the reversal of the judgment and the conviction opens up the whole controversy, and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from

> a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offence set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it, and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offence contained in the judgment which he has himself procured to be reversed.

The defendant was not twice put in jeopardy for the same offence, but was twice tried, each time for a different offence. Mr. Justice Brown in sustaining the conviction said:

> In support of his plea of *autrefois acquit* the appellant relies upon our reversal of the former judgment against him. The jury on the trial of the first indictment found him guilty of having failed to pay over the license fees in his hands after demand had been made upon him to do so. Our reversal of the judgment on that verdict *did not acquit him* of the offence charged against him in the present indictment. All that we decided was that, as the County of Schuylkill could not at the time the prosecution was instituted, have made legal demand upon the appellant for the payment of the fees in his hands, the statutory offence of failing to pay over had not been committed. He was discharged from his recognizance *simply because the prosecution against him had been instituted before the offence charged against him was or could have been committed* under the admitted facts in the case. He *was therefore never in jeopardy.* (Rec., p. 29).

The question of double jeopardy was raised by the defendant by filing a special plea of *autrefois acquit,* upon which the Commonwealth joined issue by demurrer to the plea. (Rec., 100-110). After the demurrer had been sustained the defendant pleaded the general issue, the statute of limitations, and was also permitted by the Court to plead specially *autrefois acquit.* The Commonwealth joined issue on these pleas, and the defendant having put in evidence the former conviction, the jury was directed by the Court to find against him on that plea. (Rec., pp. 162-165). This instruction was in accordance with the law of Pennsylvania as declared in Solliday v. The Commonwealth, 28 Pa., 13, from which we quote:

> A former conviction of the same offence may therefore always be pleaded; and, if the truth of such plea be established, it is a plain bar to another judgment against the accused. If the representative of the Commonwealth traverses the plea by denying that the former conviction was for the same offence, and thus forms an issue of fact, it must go to the jury, and no judgment can be given in the case until the question is disposed of. No matter how clear the opinion of the Court may be against the defendant, nobody but the jury can decide an issue like that. The judge may *influence* the verdict—in some cases he may and ought to *control* it—but he cannot pronounce it.

In Ball v. United States, supra., the same rule is declared by this Court.

We have attempted to show that the conviction of the defendant in this case has been obtained in due course of law under the statute of the State of Pennsylvania defining embezzlement and upon grounds independent of any federal question. We respectfully submit that the

defendant has been denied no right, privilege or immunity guaranteed to him by the provisions of the Fourteenth Amendment to the Constitution of the United States. This Court said, in Howard v. Kentucky, 200 U. S. 173:

> We cannot assume error in the decision of the Court of Appeals. We accept it, as we are bound to do, as a correct exposition of the law of the State, statutory, constitutional. Our inquiry can only be, Did the State law *as applied*, afford plaintiff in error *due process*, as those words are used in the Fourteenth Amendment? We think it did. It is not necessary to enter into a lengthy discussion of what constitutes due process of law. * * It may be contended that the words 'due process of law,' as used in the Fourteenth Amendment, protect fundamental rights. What those are cannot ever be the cause of such dispute. In giving them protection, however, it was not designed * * * to interfere with the power of the State to protect the rights, liberty and property of its citizens, nor *with the exercise of that power* in the adjudication of the Courts of the State in *administering the process provided by the law of the State.*

It is submitted that the judgment of the Supreme Court of Pennsylvania should be sustained.

IRVIN A. REED,
District Attorney.

C. E. BERGER,

GUY E. FARQUHAR,

Counsel for defendant in error.

SHOENER *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 161. Argued October 28, 1907.—Decided December, 2, 1907.

One is not put in jeopardy if the indictment under which he is tried is so radically defective that it would not support a judgment of conviction, and a judgment thereon would be arrested on motion.

Where the defense is that the accused is put in jeopardy for the same offense by his trial under a former indictment, if it appears from the record of that trial that the accused had not then or previously committed, and could not possibly have committed, any such crime as the one charged, and therefore that the court was without jurisdiction to have rendered any valid judgment against him—the accused is not, by such trial, put in second jeopardy for the offense specified in the last or new indictment.

Where a conviction for embezzlement has been reversed on the ground that the money had not and could not be rightfully demanded when the indictment was found the accused is not put in second jeopardy by the trial on another indictment for embezzlement after demand rightfully made.

216 Pa. St. 71, affirmed.

In a civil action brought by the County of Schuylkill, Pennsylvania, in 1901, against Shoener, the present plaintiff, for the amount of certain fees alleged to have been collected by him, as the clerk of a Quarter Sessions Court, but withheld by him from the county treasury, a judgment was rendered in favor of the county for $18,245. That judgment was affirmed upon appeal by the Supreme Court of Pennsylvania on May 4th, 1903. *Schuylkill County* v. *Shoener*, 205 Pa. St. 592.

Shoener was then proceeded against by indictment under section 65 of the Penal Code of Pennsylvania of 1860, which section is in these words: "If any State, county, township or municipal officer of this Commonwealth, charged with the collection, safekeeping, transfer or disbursement of public money, shall convert to his own use, in any way whatsoever, or shall use by way of investment in any kind of property or merchandise, any portion of the public money entrusted to him for

collection, safekeeping, transfer or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the State, county or township treasurer, or other proper officer or person authorized to demand and receive the same, every such act shall be deemed and adjudged to be an embezzlement of so much of said money as shall be thus taken, converted, invested, used or unaccounted for, which is hereby declared a misdemeanor; and every such officer, and every person or persons whomsoever aiding or abetting, or being in any way accessory to said act, and being thereof convicted, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine equal to the amount of money embezzled." Pa. L. 1860, 385, 400.

This section was construed by the Supreme Court of Pennsylvania in *Commonwealth* v. *Mentzer*, 162 Pa. St. 646, the court holding that each of the acts enumerated in the statute was a distinct and separate offense, although they might be so entirely parts of the same transaction as to constitute but one offense; that whether particular acts were so combined as to make one offense depended upon the facts in each case, and raised a question of fact for the jury.

The indictment was returned November 14, 1903—the date is important—and contained thirteen counts, those other than the fourth, eighth and twelfth counts in substance charging the accused with converting public funds to his own use, and the fourth, eighth and twelfth counts charging him only *with failing to pay over the public moneys that came into his hands*, when thereunto legally required by the county. The accused was acquitted January 6, 1904, on all the counts except the fourth, eighth and twelfth, and on those counts he was convicted. On appeal to the Superior Court the conviction was sustained, 25 Pa. Superior Ct. 526, but on appeal from that court to the Supreme Court of Pennsylvania the judgments of conviction in both the lower courts were reversed June 22, 1905, and the accused was discharged from the recognizance

which he had executed. *Commonwealth* v. *Shoener*, 212 Pa. St. 527.

In the opinion of the Supreme Court it was stated that the only demand ever made on the accused was in a letter to him from the County Controller, under date of December 30, 1902. But that demand, the court said, was made at a time when the question of the right of the accused to retain the moneys he had retained was, by agreement of the county, pending and undecided in the civil court. The court, after observing that it was competent for the county to have entered into such an agreement, said (p. 531): "How could any demand have been made at that time that the defendant was bound to heed? . . . The failure to pay on demand, as contemplated by the statute under which he is indicted, is a failure to pay that which, at the time the demand is made, clearly belongs to the county making the demand, and does not apply to a case where demand is made to pay during the pendency of the dispute as to who is entitled to the money, and which dispute, by the agreement of both parties to it, is pending determination in the courts. . . . In refusing to pay over at the time the alleged demand was made he did just what any other man, similarly situated and with due regard to his rights, would have done; and it is a perversion of the sixty-fifth section of the Act of March 31, 1860, to attempt to apply it to a case like this. The only evidence of a demand to pay over was the [Controller's] letter. This was written, and received by the appellant, at a time when the county, by its own agreement, could not have enforced any civil liability against him, and in refusing to comply with the notice to pay he was standing on his right not to do so until it was determined that the county was entitled to receive the money. The learned trial judge charged the jury that the institution of the suit in Common Pleas of the county was a legal demand for the payment of the money, and should be regarded as such demand in the prosecution of the appellant on the counts charging him with failure to pay over on demand. In the civil courts constructive de-

mands may be and are recognized, but not so in a criminal court in the prosecution for an offense having as one of its statutory ingredients a refusal to pay on demand. A demand there means actual demand. The only actual demand that the Commonwealth pretends to have made was the Controller's letter. It was written after the institution of the civil suit and after the distinct agreement by the county that the question of the defendant's liability should be judicially determined. Before being so determined there was no liability to be enforced against him civilly, and, therefore, no demand to be made upon him that he was bound to recognize. He has been acquitted on the counts charging him with a conversion of the public funds to his own use, and there was *no evidence to sustain the conviction on the charge that he had failed to pay over after having been thereunto legally required on demand made.* The eleventh assignment complains of the error of the court below in instructing the jury that there had been legal demand made upon the defendant to pay over the fees. This assignment should have been sustained. If there had been proper instructions as to a legal demand, the defendant would have been acquitted on the counts on which he was convicted. The remaining assignments need not be considered. The judgment of the Superior Court is reversed, as is that of the court below, and the defendant is discharged from his recognizance."

Subsequently, on June 30, 1905, the county made another and formal demand upon Shoener to pay over $7,243.28, that being the balance of the fees or moneys then retained by him, and ascertained, on auditing of his accounts, to belong to the county. This demand was disregarded and, on September 4, 1905, the present new indictment was found, charging only one of the offenses specified in the statute, namely, that the accused had failed, on demand, to pay into the county treasury the above sum of $7,243.28.

The defendant pleaded, among other things: that the present indictment was for the same offense as that specified in the first indictment; that his acquittal on the first nine counts of the

former indictment was an acquittal of the charge contained in the present indictment, and that after the reversal of the judgment of conviction on the fourth, eighth and twelfth counts he could not be again prosecuted for the same offense.

Referring to the opinion of the Supreme Court in the former prosecution, the trial court, in its charge to the jury, said: "When that opinion was filed in the Supreme Court of Pennsylvania, and subsequently here, and the proceedings of the previous trial were reversed, there was no crime that this defendant was called upon to answer for because the Supreme Court declared that the demand that had been made upon him was illegal, had no right to be made, and he was not bound to obey it, and therefore not bound to pay over the money when they called on him in December, 1902, because the county had no right to call on him then for this money, but they were bound to wait until after the Supreme Court as well as this court decided the question of whether or not he had any claim or right to that money. . . . Now, gentlemen of the jury, under this state of facts, I come to the conclusion that there was no crime to try when he was tried before; that the crime that is now tried in this indictment exists only since the actual demand was made, which the language of that Supreme Court opinion requires to be made before he is required to pay over."

The defendant was convicted and sentenced to imprisonment for two and a half years.

The judgment of conviction was affirmed (*Commonwealth* v. *Shoener*, 30 Pa. Superior Ct. 321; 216 Pa. St. 71), the Supreme Court saying (216 Pa. St. 80): "In support of his plea of *autrefois acquit*, the appellant relies upon our reversal of the former judgment against him. The jury on the trial of the first indictment found him guilty of having failed to pay over the license fees in his hands after demand had been made upon him to do so. Our reversal of the judgment on that verdict did not acquit him of the offense charged against him in the present indictment. All that we decided was, that, as the county of Schuylkill could not, at the time the prosecution was instituted,

have made a legal demand upon the appellant for the payment of the fees in his hands, the statutory offense of failing to pay over *had not been committed.* He was discharged from his recognizance simply because the prosecution against him had been instituted before the offense charged against him *was or could have been committed under the admitted facts of the case.* He was, therefore, never in jeopardy. If, after his conviction, the court below had arrested judgment on the verdict, he would have been in the same situation in which our reversal of it placed him, but he could not have pleaded the arrest of the judgment as a bar to a new indictment against him for an offense subsequently committed, for he never was in peril."

The plaintiff insists that his trial and conviction on the present indictment would subject him to jeopardy a second time for the offense of having failed to pay over on proper demand, thereby depriving him of his liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Mr. William Wilhelm and *Mr. E. B. Sherrill*, with whom *Mr. Charles A. Douglas*, was on the brief, for plaintiff in error:

By his trial and conviction on the second indictment, plaintiff in error has been twice placed in jeopardy for the same offense.

By long settled practice, as well as by express statutory enactment, the power of the Supreme Court of Pennsylvania over the decrees and judgments of inferior courts of the State is plenary. Where error is committed the Supreme Court is not compelled to remand the case to the lower court for a new trial, but it is given power in such case to itself do what the trial court should have done. This power is expressly conferred by the act of the General Assembly of Pennsylvania of May 20, 1901.

The power expressly conferred by this act had been exercised by the Supreme Court for many years prior to the passage of the act. *Drew* v. *Commonwealth*, 1 Whart. 281; *Daniels* v.

Commonwealth, 7 Barr, 371; *Clellans* v. *Commonwealth*, 8 Pa. St. 223; *Beale* v. *Commonwealth*, 25 Pa. St. 11.

The trial court should have directed a verdict for the defendant, but it having failed to do so, the Supreme Court, by virtue of the powers vested in it, proceeded to do what the trial court should have done, and instead of remanding the case, reversed the judgment and directed the discharge of plaintiff in error, as effectually disposing of the charge against plaintiff in error as if he had been acquitted by the verdict of the jury on all of the counts of the indictment.

The crime of embezzlement with reference to this license money was committed, if committed at all, prior to the finding of the indictment in the first case, and as plaintiff in error was acquitted in that case of the charge of embezzling that money, he cannot be tried in this case on the charge of embezzling the same identical money, but is protected by the constitutional provision against double jeopardy. Bishop, Criminal Law, Vol. 1, § 1042, *et seq.*; *Shepherd* v. *People*, 25 N. Y. 406.

The sentence under which plaintiff in error now rests puts him twice in jeopardy for the same offense, and such double jeopardy abridges his privileges and immunities as a citizen of the United States and deprives him of his liberty without due process of law.

Due process of law requires the observance of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. *In re Kemmler*, 136 U. S. 436; *Allen* v. *Georgia*, 166 U. S. 138; *Howard* v. *Kentucky*, 200 U. S. 164.

Mr. Guy E. Farquhar and *Mr. C. E. Berger*, with whom *Mr. Irvin A. Reed*, was on the brief, for defendant in error.

Mr. Justice Harlan, after making the foregoing statement, delivered the opinion of the court.

The contention that, by the judgment of the Supreme Court of Pennsylvania, the plaintiff in error has been deprived of a

right secured to him by the Constitution of the United States must be overruled. He has not been twice placed in jeopardy for the same offense. Upon the hearing of the case arising out of the first indictment the Supreme Court of Pennsylvania, construing the statute under which the defendant was prosecuted, and looking at the undisputed facts appearing of record, adjudged that he had not then committed any criminal offense; that he had not failed to pay over moneys belonging to the county upon any demand, disregard of which subjected him to criminal liability; consequently, it was held that no valid judgment of conviction could have been rendered against him in the first prosecution for failing to pay over the moneys in question, or any part thereof, on the particular demand shown in the record of that prosecution. These were questions of local and general law which it was the province of the Supreme Court of Pennsylvania to determine conclusively for the parties. They presented no question of a Federal nature.

Assuming, then, that no valid judgment could have been rendered against the accused upon the first indictment for disregarding the demand upon which that indictment was based, it necessarily follows, as held by the Supreme Court of Pennsylvania, that that prosecution did not put the accused in jeopardy in respect of the particular offense specified in the last indictment. That offense was never committed until the demand of June 30, 1905 was disregarded. The defense of double jeopardy could not be sustained unless we should hold that the charge against Shoener in the first indictment could be sustained under the statute. But we cannot so adjudge without disregarding altogether the decision of the Supreme Court of Pennsylvania and without holding that an accused is put in peril by a prosecution which could not legally result in a conviction for crime. It is an established rule that one is not put in jeopardy if the indictment under which he is tried is so radically defective that it would not support a judgment of conviction, and that a judgment thereon would be arrested on motion. So where the defense is that the accused was put

in jeopardy for the same offense by his trial under a former indictment, if it appears from the record of that trial that the accused had not then or previously committed and could not possibly have committed any such crime as the one charged, and therefore that the court was without jurisdiction to have rendered any valid judgment against him—and such is the case now before us—then the accused was not, by such trial, put in jeopardy for the offense specified in the last or new indictment.

As it was thus correctly decided that the accused was not, by the present indictment, put in jeopardy for the second time for the same offense, we need not go further or consider any question of a Federal nature, and the writ of error must be dismissed.

It is so ordered.